709-446

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~80~~ 17

GEORGE A. CUNNINGHAM, APPELLANT,

vs.

THE MACON AND BRUNSWICK RAILROAD COMPANY, EDWARD A. FLEWELLEN, W. A. LOFTON, AND GEORGE S. JONES, STYLING THEMSELVES DIRECTORS OF THE MACON AND BRUNSWICK RAILROAD; J. W. RENFROE, TREASURER OF THE STATE OF GEORGIA; ALFRED H. COLQUITT, GOVERNOR OF THE STATE OF GEORGIA; THE FIRST NATIONAL BANK OF MACON, AND JOHN H. JAMES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

FILED OCTOBER 16, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 80.

GEORGE A. CUNNINGHAM, APPELLANT,

vs.

THE MACON AND BRUNSWICK RAILROAD COMPANY; EDWARD A. FLEWELLEN, W. A. LOFTON, AND GEORGE S. JONES, STYLING THEMSELVES DIRECTORS OF THE MACON AND BRUNSWICK RAILROAD; J. W. RENFROE, TREASURER OF THE STATE OF GEORGIA; ALFRED H. COLQUITT, GOVERNOR OF THE STATE OF GEORGIA; THE FIRST NATIONAL BANK OF MACON, AND JOHN H. JAMES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

INDEX.

	Original.	Print.
Bill	2	1
Exhibit A (mortgage railroad company to State)	30	10
B (deed of postponement and release)	37	12
C (first mortgage bond Macon and Brunswick Railroad Company)	43	15
D (copy of bond)	48	16
E (deed)	51	18
F (letter of Governor Smith to Flewellen)	59	21
G (deed of Governor Smith to State)	60	22
Subpœna for southern district	66	24
Return of marshal	68	24
Subpœna for northern district	69	25
Return of marshal	71	25
Appearance	71	26
Demurrer and plea of defendants Flewellen, Lofton, and Jones	74	27
Plea of defendant Renfroe	77	28
Demurrer of A. H. Colquitt	79	29
Pleas of A. H. Colquitt	81	29
Order setting case down for hearing	83	30
Answer of J. H. James	85	30
Order for hearing on demurrer in vacation	96	33

	Original.	Print
Decree on demurrer	97	34
Application for and allowance of appeal	98	34
Order	99	35
Bond for costs on appeal	100	35
Petition for appeal to Supreme Court	103	36
Clerk's certificate	108	38
Citation	109	38
Service	110	38
Assignment of error	111	39

1 UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

At a stated term of the circuit court of the United States of America for the southern district of Georgia, held at the United States court-rooms in the city of Savannah, in and for the said district, on Thursday, the seventh day of November, in the year of our Lord one thousand eight hundred and seventy-eight.

Present, the honorable Wm. B. Woods, U. S. circuit judge for said circuit, presiding, and the Hon. John Erskine, U. S. judge for Georgia.

GEORGE A. CUNNINGHAM, COMPLAINANT,
and
THE MACON AND BRUNSWICK RAILROAD COMPANY et al., defendants.
} In equity. Bill for discovery, relief, etc.

Be it remembered that heretofore, to wit, on the 29th day of September, A. D. 1877, came the said complainant and filed his bill for discovery, relief, etc., against the said defendants, in the words and figures following, to wit:

Bill.

2 UNITED STATES OF AMERICA,
Southern District of Georgia:

To the judges of the circuit court for said district:

George A. Cunningham, a citizen of and resident in the State of Virginia, brings this his bill of complaint, in behalf of himself and all holders of the second series of the bonds of the Macon and Brunswick Railroad Company, endorsed by the State of Georgia, who may choose to be made parties hereto and bear their pro rata of expenses against the said The Macon and Brunswick Railroad Company of said district, a corporation created by the laws of Georgia, and having its principal place of business in the city of Macon, in said district, and conducting its business operations wholly within said district, and against Edward A. Flewellen, W. A. Lofton, and George S. Jones, all citizens of and residing in the State of Georgia, and in said district, and styling themselves "Directors of the Macon and Brunswick Railroad," and

3 against J. W. Renfroe, treasurer of the State of Georgia, and Alfred H. Colquitt, governor of the State of Georgia, both citizens of and resident in said State of Georgia, in the northern district thereof, and against the First National Bank of Macon, a corporation created under the laws of the United States and located at and transacting its business in the city of Macon, in said southern district of Georgia, and against John H. James, a citizen of and resident in the northern district of Georgia. And thereupon your orator complains and says:

That the general assembly of Georgia, on the third day of December, 1866, passed an act authorizing the governor of Georgia to endorse the bonds of The Macon and Brunswick Railroad Company to the extent of $10,000 per mile, and on the fourth of December, 1866, said assembly passed a series of resolutions annexing certain conditions to said endorsement, all of which will fully appear by reference to said act and resolutions.

Your orator further shews that, under said act and resolutions, said company issued bonds to the amount of $1,950,000, which were

4 endorsed by the governor and afterwards negotiated by said company.

Your orator further shews that, by the provisions of said act, said endorsement operated as a statutory mortgage of said railroad, and all other property of the company which they owned at the time of the endorsement to the holders of said bonds for the better securing of the payment of said bonds.

Your orator further shews that out of abundant caution, or for some other reason unknown to your orator, said company, on the 22nd of June, 1870, executed a mortgage to the governor of Georgia for the purpose "of confirming the lien created by the aforesaid act in favor of the holders of said bonds, so endorsed as aforesaid," as will fully appear by reference to a copy of said mortgage hereto annexed, marked A, to which the usual reference is prayed.

Your orator further shews that, on the 27th of October, 1870, said general assembly passed an amendment to said act of December 3d, 1866, authorizing the governor to endorse the bonds of said company for the amount of $3,000 per mile in addition to said endorsement of $10,000 per mile then made under the act of 1866.

5 Your orator further shews that before the passage of said last-named act, and subsequent to the act of 1866, said company had issued a second class of bonds to the amount of $1,100,000, or other large sum, which were not endorsed by the State, and secured the same by what was called a second mortgage, subordinate in rank to the lien created in favor of the $1,950,000 bonds endorsed by the State under the act of 1866.

Your orator further shews that the trustees under said second mortgage, by and with the consent of the holders of all of said second mortgage bonds, executed a release or postponement of their lien in favor of the bonds of said company to the amount of $600,000 to be issued by the company and endorsed by the State under said act of 1866 as amended by that of October 27th, 1870, a copy of which release is hereto annexed, marked B.

Your orator further shews that after said release had been executed and had been accepted by the governor and deposited by him in the executive office in Atlanta, said bonds, so authorized to be en-

5½ dorsed by the act of 1870, were issued by said company to the amount of $600,000, and, after endorsement by the governor, negotiated by them, for a valuable consideration, in December, 1870.

Your orator hereto annexes a copy of one of the bonds (all of said bonds being alike, except as to number and amount) issued and endorsed under the act of 1866, marked C, and a copy of those (all being alike except as to number) issued and endorsed under the act of 1866 as amended by the act of 1870, marked D, and pray reference to both as often as necessary.

Your orator further shews that during the session of the general assembly of Georgia in 1872 that body appointed a committee to investigate the validity of the State's endorsement upon the bonds of the Macon and Brunswick Railroad Company (among many other bonds issued and endorsed by the State) and, after such investigation, passed, on August 14th, 1872, the following resolution:

"A resolution in reference to the State's guaranty on the bonds of the Macon & Brunswick Railroad Company.

6 "Resolved by the senate and house of representatives in general assembly met, and it is hereby resolved by authority of

the same, that the State's guaranty placed on bonds of the Macon and Brunswick Railroad Company is binding on the State.

Approved August 14th, 1872."

Your orator further shews that the constitution of Georgia provides: "The general assembly shall pass no law making the State a stockholder of any corporate company; nor shall the credit of the State be granted or loaned to aid any company without a provision that the whole property of the company shall be bound for the security of the State prior to any other debt or lien except to laborers."

Your orator further shows that without any suspicion that the $600,000 series of bonds issued by said railroad company, and endorsed by the State under the act of 1866, as amended by the act of 1870, were in any way invalid and relying on the statutory mortgage created by said acts on the property of said company in favor of said bonds, as well as the confirmation thereof by said recorded mortgage
7 executed by said company on June 22d, 1870, and accepted by the governor, and also upon said postponement of lien by the second mortgages in favor of said $600,000 series, and upon the affirmance of the validity of said endorsement by the resolutions of August 14th, 1872, as well as by the constitutional provision herein recited; your orator, after the approval of said resolutions of 1872, became, for a valuable consideration and in good faith, without any knowledge or notice whatsoever of any fraud or illegality in the issue, endorsement or of any failure of said company to comply with the terms upon, which said endorsement was authorized by law, the holder of nineteen of said second series of endorsed bonds, each for the sum of $1,000, numbered 120, 122, 123, 124, 125, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 518, 519, and 520.

Your orator further shews that on July 1st, 1873, and on November 1st, 1873, said company failed to pay the coupons as well upon the $1,950,000 series as upon the $600,000, and has continuously failed to pay the coupons due at that date, and those due at all subsequent dates, whereby the principal of said bonds became due six
8 months after the first default, according to the tenor and effect of said bonds.

Your orator further shews that he is still the owner of said bonds.

Your orator further shews that on or about July 2nd, 1873, the then governor of Georgia, under power vested in him by said acts of 1866 to seize said railroad in case of default in payment of the interest due on said bonds, seized said railroad and all other property of said company, including in said seizure the property mentioned in a trust deed from said company to one L. N. Whittle (hereto annexed, marked E, to which the usual reference is prayed), which property is not covered by said statutory and executed mortgages so far as the $1,950,000 series of endorsed bonds are concerned, having been acquired by said company after the last of said series had been endorsed, and with funds other than the proceeds of said bonds, but is covered by said mortgages so far as the $600,000 series is concerned, having been bought prior to the endorsement of these latter.

Your orator further shews that on March 6th, 1875, the general
9 assembly of Georgia passed a series of resolutions declaring the endorsement of the State upon the $600,000 series of bonds issued by said company "unconstitutional, null, and void," and reaffirming the validity of the endorsement on the $1,950,000 series, and authorizing the governor to sell the Macon and Brunswick Railroad with all its franchises, equipments and appurtanances, etc., upon such terms

and for such price in money or first mortgage endorsed bonds (meaning the $1,950,000 series) of the Macon and Brunswick Railroad, or bonds of the State, as in his judgement may be consistent with the interest of the State.

Your orator further shews that said governor, after seizing said road, appointed said Flewellen receiver, to take charge of the Macon and Brunswick Railroad and all the property of said company and sell the same.

Your orator further shews that under orders from James M. Smith, the then governor of Georgia, said Flewellen, against his own better judgement, advertised said railroad and its franchises and all other property of said company, so seized as aforesaid, including the
10 property embraced in the deed to Whittle, for sale on the first Tuesday in June, 1875, in the city of Macon, at the depot of the Macon and Brunswick Railroad Company, at public outcry and between the legal hours of sale. Said advertisement also stated that said property would be offered "for cash, for the bonds of the State, or the first mortgage bonds of the company endorsed, in behalf of the State, under the authority of the act approved December 3d, 1866."

Your orator further shews that the said governor in his order directing sale dated "Atlanta, April 5th, 1875," also states the terms of sale in the same language, notwithstanding which, said governor on the day of sale caused it to be announced that said first mortgage bonds would only be received at their then market value, which was much below par, thus causing said railroad to sell far below its true value, and deterring the holders of said bonds from bidding on said railroad, who, had they been permitted to pay for said property with bonds endorsed by the State and held by them, would have paid a much higher price than the said property brought.

11 Your orator further shews that said governor in making said sale did not do so "in such manner and at such time as in his judgement would best subserve the interest of all concerned."

On the contrary, said sale was effected in such a manner and at such time as, even in the judgement of said governor, was most detrimental to the interests of the bondholders, and this was done in the face of the warning given to said governor by said Flewellen, that the time and manner of sale selected was most unfortunate, and so admitted to be in a letter from said governor to said Flewellen, bearing date March 24th, 1875, a copy of which is hereto annexed, marked F, to which reference is asked.

Your orator further shews that said sale took place as advertised and the entire property seized was sold and bought by said governor for the State, and a deed made by him to the State for the whole of it (a copy of which deed is hereto annexed, marked G, with prayer for reference thereto), the whole price paid for the vast amount of property being the nominal sum of $1,000,000.

12 Your orator insists that said sale is void for the following reasons:

1st. Because neither the legislature nor the governor had the right to exclude the $600,000 series of endorsed bonds from being used as so much cash, in the purchase of said road, at their face value. Certainly they were entitled to be so used, in event of the exhaustion of the $1,950,000, which themselves should have been received as cash at par.

2nd. Because the governor was not authorized to bid on said property for the State, and the State had no constitutional power to make the purchase. Or if said sale is not void, it is certainly voidable, be-

cause under the statutory and executed mortgages the State is the trustee of the property mortgaged for the benefit of the bondholders, and had no right to buy at her own sale, as such trustee, without incurring the risk of having said sale set aside at the instance of any beneficiary under the trust, and your orator as such beneficiary elects to set said sale aside.

13 Your orator further shows that the State of Georgia has voluntarily taken up all of said $1,950,000 series of bonds, for which she was liable on her endorsement, by substituting therefor her own bonds dollar for dollar, and that J. W. Renfroe, as treasurer of Georgia, is regularly paying the coupons on the bonds so substituted as they fall due.

Your orator insists that said act of 1870 opened said statutory mortgage and said mortgage executed in pursuance of said act of 1866 for the benefit of the holders of the bonds issued under the act of 1866 as amended by said act of 1870, so as to give them a lien upon said railroad prior to all others except the $1,950,000 series, which last-named series having been voluntarily paid by the State, the second series now constitute the first lien, and are entitled to have said mortgages foreclosed for their payment.

Your orator further shews that the said Flewellen and others, so-called directors of the said Macon and Brunswick Railroad, are operating said railroad in entire disregard of the rights of your orator and other holders of the second series of State endorsed bonds, and without ap-

14 propriating any of the earnings of said railroad to the payment of said bonds or the coupons thereof, and that said bonds and coupons have remained wholly unpaid since the company first defaulted in payment of said coupons, more than six months before the filing of the bill in this case.

Your orator further shows that since the seizure of said railroad by the governor, said Macon and Brunswick Railroad Company has remained entirely insolvent, and has ceased to do business, and owns no property other than that seized by the governor.

Your orator further shews that said property, transferred to L. N. Whittle and another, was transferred to them as trustees to dispose of the same, and with the proceeds redeem certain fare-bills of said company, but that said trust was never carried out by them, said fare-bills having been fully paid with the earnings of said railroad.

Your orator further shows that the three bonds, for one thousand dollars each, of the $1,950.000 series of endorsed bonds, held by Whittle under said deed, were delivered by him to said Renfroe, who now holds them, and that said Whittle has also transferred on the books of the

15 Southern and Atlantic Telegraph Company, in the city of New York, the 440 shares of stock conveyed to him in trust by said deed, which stock is now standing, in the name of said Renfroe, on the books of said company, said Renfroe regularly drawing the dividends thereof, amounting to ——— dollars.

Your orator further shews that bonds of the $600,000 series, to the amount of $76,340.20, were exchanged for the same amount of coupons of the $1,950,000 series, and that the $600,000 series, to this extent at least, stands precisely upon the same footing with the $1,950,000, which have been twice pronounced valid by the State. Yet, the said Renfroe and all others holding the property of said Macon and Brunswick Railroad Company utterly deny your orator's rights and the right all other holders of the $600,000 series of bonds to subject said property to the payment of said bonds.

Your orator further shews that lots Nos. 1 and 7, in block 10, southwest corner, in the city of Macon, which are embraced in said deed of trust to Whittle and another, are now held and claimed by said First National Bank of Macon. All other property of said company
16 seized by the governor, except as herein otherwise stated, is now in the hands of said Flewellen and others, styling themselves "directors of the Macon and Brunswick Railroad."

Your orator further shews that the said mortgage from the Macon and Brunswick Railroad Company to the governor, recorded as aforesaid, is now in the hands of said Colquitt, as governor, as are also the release of the second mortgagees in favor of the $600,000 series of bonds, and the deed from James M. Smith, as governor, to the State of Georgia, of the entire property of said railroad company, and the trust-deed to Whittle and Collins.

Your orator further shews that said Flewellen, Lofton, and Jones are directly interested in said railroad and other property herein alleged to be in their hands, paying themselves large salaries out of the earnings for the management thereof.

Your orator further shews that this bill is filed for the purpose, among others, of foreclosing said mortgages in favor of the payment of the said second series of endorsed bonds, upon the assumption that said mortgages are mortgages to the governor of Georgia,
17 as trustee for the bondholders, to secure the payment of the bonds endorsed by the State, and not mortgages of indemnity to the State, to save her harmless against the liability incurred by said endorsement.

If, however, the court should be of opinion that the mortgages are mortgages of indemnity to the State, and that the sale of railroad and purchase by the State were valid, then your orator insists that both series of endorsed bonds stand upon an equal footing, and are entitled to be paid pro rata out of the proceeds of said sale, and that the sums paid by said Renfroe, as treasurer of the State, in taking up the coupons of the State bonds, which have been exchanged for the $1,950,000 series of Macon & Brunswick Railroad endorsed bonds, represent a portion of these proceeds, and should be paid pro rata upon both series of bonds; and that when the legislature of Georgia appropriates any sum for the payment of the principal of the State bonds so exchanged, such sum should in like manner be divided pro rata among the holders of both series of endorsed bonds, and that the State bonds so
18 exchanged should themselves be treated as the proceeds of the sale of the railroad, and divided pro rata among all the holders of both series of State endorsed bonds.

Your orator further shows that among the holders of said State bond so exchanged as aforesaid is John H. James, of the northern district of said State, and many others unknown to your orator, who, when discovered, your orator prays may be made parties defendant hereto, all of whom hold said bonds in varying amounts unknown to your orator.

To the end therefore that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note here underwritten, they are respectively required to answer, that is to say:

1. Whether it is not true that under the act of December 3d,

1866, the Macon and Brunswick Railroad Company did issue bonds to the amount of $1,950,000, which were endorsed by the State, and afterwards put in circulation?

2. Whether said company did not under said act, as amended by the act of 1870, issue bonds to the amount of $600,000, which were endorsed by the State and afterwards put in circulation?

3. Whether said Flewellen did not take charge of said railroad and other property under the appointment of the governor, after the latter's seizure of the same, and advertise the same as stated in this bill?

4. Whether said Macon & Brunswick Railroad Company is not insolvent, and did it not cease to pay the coupons on said endorsed bonds more than six months before the filing of this bill in this c'use; and has it not continuously since failed to pay said coupons? Has said company any property other than that seized by the governor?

5. Did not the Macon and Brunswick Railroad Company execute the original of the copy mortgage hereto attached, marked A, and did not the governor accept the same and have it recorded, and is not the original now in the executive office in Atlanta?

6. Did not the governor sell said railroad as stated, and buy it in for the State for $1,000,000; and has not the State since said sale taken up the entire series of bonds herein called the $1,950,000 series, and substituted her own bonds for the same, dollar for dollar; and does not the State treasurer pay the coupons of such substituted bonds as they fall due, in January and July of each year?

7. Did not the governor announce in advance of said sale that he would only take in payment for said railroad cash, State bonds, or first-mortgage bonds of said railroad (meaning by the last named the $1,950,000 series), and that these last would only be received at their then market value, and was not such market value very much below par?

8. Do you not know that many of the holders of the endorsed bonds would have bid a much higher price for the railroad than it brought, had they been permitted to pay for it with said endorsed bonds at par?

9. Are not said Flewellen and others, calling themselves directors of the Macon and Brunswick Railroad, operating said road in entire disregard of any interest which the holders of the second series of endorsed bonds may have in the road, and without appropriating any of the earnings of the road to the payment of said bonds or the coupons?

10. Did not said railroad company make default in the payment of the coupons of said second series of endorsed bonds more than six months before the filing of this bill, and has it not continuously since failed to pay said coupons?

11. Is it not true that in seizing said railroad the governor seized other property belonging to said company not embraced in said mortgages so far as the same operated as a security for the payment of the first series of said endorsed bonds? Did he not seize all the property owned by the company at the time of the seizure? If not, specify what property he omitted to seize.

12. Was any of the property so seized, which was not covered by the mortgages, bought with the proceeds of the $1,950,000 series of endorsed bonds? If so, specify the property so bought. Was any of it bought with the proceeds of the $600,000 series? If so, specify it.

13. Was not the property named in the trust deed to L. N. Whittle and others, annexed to this bill as Exhibit E, acquired by the company after the last endorsement was placed on the $1,950,000

series, and was not such property bought by the company with funds derived from other sources than the proceeds of said last-named series?

14. Were not the fare-bills issued by said company redeemed with the earnings of the railroad, and not with the proceeds of the property conveyed to Whittle and others in trust for that purpose? If not, how were they redeemed, and to what amount?

15. Was not all the property seized by the governor sold with the railroad and bought in by him in the name of the State for $1,000,000? If not, name the property not included in the sale.

16. Were not the bonds styled in the schedule annexed to said trust deed to Whittle and others "supplementary bonds endorsed by the State" exchanged for three of the first mortgage bonds of $1,000 each? And were not said bonds delivered by Whittle to said Renfroe, and did not Whittle transfer on the books of the Southern and Atlantic
23 Telegraph Company the four hundred and forty shares of stock named in the deed to him to said Renfroe, and are not said bonds and stock now held by Renfroe?

Does not Renfroe deny that complainant and other holders of the $600,000 series of endorsed bonds have any interest in the property transferred by Whittle to him? And does he not regularly draw dividends upon the stock? How much has he so drawn?

17. Is not all other property seized as aforesaid (with the exception stated) now in the hands of said Flewellen and others styling themselves directors of the Macon and Brunswick Railroad, and do they not deny all interest of the holders of the second series of endorsed bonds therein?

18. Does not the First National Bank of Macon hold and claim lots 1 and 7, in 10th block in the city of Macon, as stated?

19. Is not said Renfroe in possession of said first mortgage bonds Nos. 291, 292, and 293, each for $1,000 as herein stated, and were not the 440 shares of stock in the Southern and Atlantic Telegraph Company transferred to him by Whittle as stated, and do they not now stand in said Renfroe's name on the books of said company?

24 20. Is it not true that before the act of October 27th, 1870, and subsequent to that of 1866, said railroad company issued what were called second mortgage bonds to the amount of $1,100,000, or other large sum, secured by a mortgage on said railroad and appurtenances, subordinate in rank to the lien in favor of the $1,950,000 bonds endorsed by the State under the act of 1866; and did not the trustees under that mortgage postpone their lien, as stated, in favor of said $600,000 series? Was not this postponement accepted by the governor, and did he not after such acceptance endorse said $600,000 series? Is not Exhibit B a copy of the instrument postponing said lien, and is not the original now in the executive office?

21. Are not Exhibits C and D correct copies, the first of the first series of endorsed bonds, and the second of the second series?

22. Did not the governor seize said property as stated, and was it not advertised for sale as stated, and did not the governor in his order directing said sale state the terms of the sale in the language used in said advertisement?

23. Was not the governor warned by Flewellen that the terms
25 of sale and the time selected were not the best for an advantageous sale, and is not Exhibit F a copy of his letter to said Flewellen in answer to such advice?

24. Is not Exhibit G a copy of the deed made by James M. Smith, as governor, to the State, and is not the original now in the executive office?

25. Were not coupons of the first series of endorsed bonds to the amount of $76,340.20 exchanged for the same amount of bonds of the second series of endorsed bonds; if not, how much was so exchanged?

26. Are not all papers stated in this bill to be in the executive office or in the hands of said Colquitt, as governor, now in said office and subject to the control of said governor?

27. What salaries do said Flewellen, Lofton, and Jones receive as "directors of the Macon and Brunswick Railroad," and how paid?

And that a receiver may be appointed to take charge of said railroad and other property of said company, and the various defendants herein named be decreed to deliver all of said property now in their hands to said receiver. And that said Renfroe may be decreed to transfer said four hundred and forty shares of stock to said re-
26 ceiver on the books of the Southern and *and* Atlantic Telegraph Company, as well as surrender the bonds now held by him in lieu of those delivered to him by Whittle, to said receiver; and that the said defendants may be enjoined from parting with said property, or any of it, or the proceeds thereof, except as this court may decree; and that the said mortgages may be foreclosed, and the property embraced therein sold, and the proceeds applied to the payment of said $600,000 series of State endorsed bonds and their coupons, past due, and the remainder of such proceeds, if any, paid to whomsoever they may be who are entitled to it.

And that said Colquitt may bring into court the originals of all papers herein alleged to be in his possession, or in the executive office, and that the deed from James M. Smith, as governor, to the State of Georgia may be cancelled.

Or if the court should be of opinion that said mortgages are mortgages of indemnity to the State, and said purchase of said railroad by the State is valid, then that any of said property not covered by the mortgages may be decreed to be delivered by the holders thereof to said receiver, and that said Renfroe be enjoined from paying
27 any further coupons on the bonds of the State exchanged for the $1,950,000 series of said endorsed bonds, and that the holders of said exchanged bonds, when discovered, may be made parties defendants hereto, and compelled, with said John H. James, to discover the amount of such bonds held by each, and that they may be compelled to account to your orator and other holders of said $600,000 series of bonds for their pro rata of such exchanged bonds, and in the meantime that John H. James be restrained from disposing of said exchanged bonds.

And that your orator may, with other holders of said second series of bonds, have such other and further relief as the circumstances of the case may require and to your honors shall seem meet, may it please your honors to grant unto your orator not only the writ of injunction to be directed to the said Edward A. Flewellen, W. A. Loflin, and George S. Jones, styling themselves "Directors of the Macon & Brunswick Railroad," the First National Bank of Macon, and J. W. Renfroe, restraining them from parting with the property hereinbefore described, or so much thereof as may be in their hands, or the proceeds thereof; or if the court be of opinion that the sale of said railroad to the
28 State was valid, then restraining them from parting with so much of said property not covered by the mortgages as may be in their hands, and restraining said John H. James from parting with any of said exchanged bonds now held by him, and said Renfroe from paying any of the coupons of said State bonds so exchanged for the first series of endorsed bonds, until further order of this court—but also the

usual writ of subpœna to be directed to the said defendants against whom injunction is prayed and the Macon and Brunswick Railroad Company and John H. James and said Colquitt, commanding them, under a penalty to be therein limited, by attorney and personally, or by attorney, to be and appear on a certain day before this honorable court to make answer to the matters and things herein set forth.

And that your honors will grant an order appointing some fit and proper person, to be named by the court, to take charge of said railroad and other property of said Macon and Brunswick Railroad Company and hold the same until the further order of the court.

And that the State of Georgia may come in and make herself
29 a party defendant to this bill if she should wish to do so.

And that the court will pass a further order requiring said Colquitt to bring into court the originals of all papers herein stated to be in his hands or in the executive office.

And your orator will ever pray, etc.

A. G. MAGRATH,
W. W. MONTGOMERY,
Complainants' Solicitors.

NOTE.—Each defendant is required to answer all the interrogatories.

W. W. MONTGOMERY,
Complainants' Solicitor.

STATE OF GEORGIA,
Richmond County:

I, Thomas P. Branch, attorney in fact of George A. Cunningham, do swear that the facts stated in the foregoing bill relating to the purchase of the bonds therein named and the non-payment of the coupons to said bonds attached, are true of my own knowledge. The other facts stated in said bill I believe to be true.

THOS. P. BRANCH.

Sworn to and subscribed before me this 17th day of September, 1877.

W. M. MOORE. [SEAL.]
U. S. Commissioner for the So. Dist. Ga.

30 EXHIBIT A.

To all to whom these presents shall come, greeting:

Know ye, whereas by an act of the general assembly of the State of Georgia, passed on the 4th day of December, one thousand eight hundred and sixty-six, entitled "An act to extend the aid of the State to the completion of the Macon & Brunswick Railroad, and for other purposes," his excellency the goverr or of said State was authorized to place the endorsement of said State on certain bonds of the Macon & Brunswick Railroad Company, to be by them issued on the terms and for the amount in said act specified, as by reference thereto will more fully and at large appear;

And whereas it was in said act further provided that any endorsement of said bonds, when made as aforesaid, should not only vest the title to all property of every kind which might be purchased therewith in the State of Georgia until all the bonds so endorsed should be paid, but that the said endorsement should be, and was hereby, understood
31 and declared to operate as a first or prior lien or mortgage on all the property of the said the Macon & Brunswick Railroad Company, to be enforced as specially provided in said act above referred to;

And whereas, in pursuance of said act, the endorsement of the State

has been placed on certain of the bonds of said company, amounting, in the aggregate, to the sum of one million nine hundred and fifty thousand dollars, fifteen hundred of said bonds being for the sum of one thousand dollars each, and nine hundred of said bonds being for the sum of five hundred dollars;

And whereas the said the Macon & Brunswick Railroad Company are desirous of confirming the lien created by the aforesaid act in favor of holders of said bonds so endorsed as aforesaid:

Now, therefore, this indenture witnesseth that the said the Macon & Brunswick Railroad Company, parties of the first part, for the purpose of confirming the aforesaid lien, and for the better securing the payment of the said sum of money mentioned in the condition of their said bonds or obligations, above referred to, and endorsed as aforesaid, with interest thereon, according to the true intent and meaning thereof, and also for and in consideration of the sum of one dollar to them in hand paid by his excellency Rufus B. Bullock, the governor of the State of Georgia, party of the second part, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed, and confirmed, and by these presents do grant, bargain, sell, alien, release, convey, and confirm, unto his excellency Rufus B. Bullock, governor of the State of Georgia, party of the second part, and to his successors in office, and assigns forever, all their railroad, constructed or to be constructed, from Macon to Brunswick, including the branch road to Hawkinsville, in the State of Georgia, with its superstructure, tracks, rails, bridges, viaducts, culverts, fences, and other appurtenances, together with all rights of way now acquired or obtained or hereafter to be acquired or obtained by the said parties of the first part, and including all depots, engine-houses, car-houses, station-houses, and other structures, all machine shops, and other shops, and the lots, pieces or parcels of ground on which the same are or may be erected, and all the pieces of land which shall be used for depots or station purposes, with the appurtenances.

32

33

Also, all locomotives, tenders, cars, and other rolling stock or equipments, and all machinery, tools, implements, fuel, and materials acquired, or to be hereafter acquired, for the constructing, operating, repairing, or replacing the said railroad, or any part thereof, or any of its equipments, or appurtenances, and including also all franchises, rights, and privileges of said parties of the first part, connected with or relating to the said railroad, or the construction, maintenance or use thereof; but nothing herein contained shall be construed as including any lands of the company not necessary to be retained for the roadway, depot, grounds, stations, shops, engine-houses, car-houses, nor required for the construction or convenient use of the road; together with all and singular the tenements, heredit'ments, and appur'enances thereunto belonging, or in any wise appertaining, and the reversions, remainders, tolls, incomes, rents, issues, and profits thereof; and, also, all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, and to the same and any and every part thereof, with the appurtenances; to have and to hold the above granted and described premises, with the appurtenances, unto the said party of the second part, his successors in office and assigns, to his and their own proper use, benefit, and behoof forever.

34

Provided always, and these presents are upon this express condition, that if the said Macon and Brunswick Railroad Company, parties of

the first part, their successors or assigns, shall well and truly pay said principal sum of money mentioned in the condition of the said bonds or obligations, and the interest thereon at the time and in the manner mentioned in the said condition, according to the true intent and meaning thereof, that then these presents and estate hereby granted shall cease, determine and be void, and if default shall be made in the payment of said some of monoy above mentioned, or the interest
35 that may grow due thereon, or of any part thereof, that then, and from thenceforth, upon information of such default, it shall be lawfull for the said party of second part, his successors in office and assigns, to seize and take possession of all the hereinbefore described property and apply the earnings of said road to the extinguishment of said bond or bonds or coupons for the interest due or to become due thereon, and to sell the said road and its equipments and other property belonging to the said Macon & Brunswick Railroad Company in such manner and at such time, as in his judgment may best subserve the interest of all concerned.

And as the attorney of the said parties hereto of the first part, for that purpose by these presents duly authorized, constituted, and appointed to make and deliver to the purchaser or purchaser' thereof a good and sufficient deed or deeds of conveyance in the law for the same in fee simple, and out of the money arising from such sale to retain
36 the principal and interest which shall then be due on the said bonds or obligations, together with the costs and charges of advertisement and sale of the said premises, rendering the surplus of the purchase money (if any they shall be) unto *to* Macon and Brunswick Railroad Company, parties of the first part, their successors or assigns, which sale so to be made shall forever be a perpetual bar, both in law and equity, against the said parties of the first part, their successors and assigns, and all other persons claiming or to claim the premises, or any part thereof, by, from, or under them, or either of them.

In witness whereof the said parties of the first part have caused their common seal to be affixed, and the same to be subscribed by their president the day and year first above written.

GEO. H. HAZLEHURST, *President.*
G. E. STOCKBRIDGE, *Secretary.*

Sealed and delivered in presence of—the words "and assigns" erased wherever they appear in this mortgage before execution of the same, this 22d day of June, 1870—

C. J. WILSON,
L. N. WHITTLE,
37 *Notary Public, Bibb Co., Ga.* [L. S.]

Recorded July 22nd, 1870.

CLERK'S OFFICE, SUPERIOR COURT,
August 17th, 1877.

GEORGIA, *Bibb County:*

I certify that the annexed and foregoing five pages contain a full, true, and complete copy of an original mortgage deed from the Macon & Brunswick Railroad Company to the State of Georgia, as the same appears from the records and files of said court.

Given under my hand and seal of office.

A. B. ROSS, *Clerk.* [L. S.]

EXHIBIT B.

Know all men by these presents, that whereas, by indenture of mortgage, dated the first day of September, one thousand eight hundred and sixty-eight, the Macon & Brunswick Railroad Company did mortgage unto Samuel A. Strang and James J. Goodwin, of the city of New York, as trustees, all the road, road-bed, and property of them, the said Macon and Brunswick Railroad Company, described and
38 set forth in said indenture, to secure the payment of certain bonds of said company therein mentioned, subject, however, to the lien and rights of the State of Georgia growing out of the endorsement by said State under and in accordance with the terms of an act of legislature of said State passed on the fourth day of December, one thousand eight hundred and sixty-five, entitled "An act to extend the aid of the State to the completion of the Macon and Brunswick Railroad, and for other purposes," of certain bonds of said company to the extent of ten thousand dollars a mile, which said last-mentioned bonds had been so endorsed and issued prior to the execution of said mortgage; and whereas afterwards namely, on the twenty-seventh day of October, one thousand eight hundred and seventy, another act was passed by said legislature of the State of Georgia, amendatory of said first-mentioned act, and entitled "An act to amend an act to extend the aid of the State to the completion of the Macon & Brunswick Railroad, and for other purposes," under and by which said amendatory
39 act the governor of said State was authorized to place the endorsement of the State to the extent of three thousand dollars per mile upon the bonds of said Macon and Brunswick Railroad Company, in addition to ten thousand dollars as recited in the said act so amended; and whereas the holders of the said bonds secured by the said mortgage to us, as trustees, and issued by said Macon and Brunswick Railroad have, in writing duly executed by them, consented that the said additional three thousand dollars a mile of bonds, the endorsement of which by the State of Georgia has been authorized by said amendatory act, passed October 27th, 1870, be a prior lien upon the property embraced in the said mortgage, in such manner and to such extent as is required under the constitution of Georgia and the act authorizing such endorsement, and have in writing duly executed by them as aforesaid, authorized, empowered, and directed us, Samuel A. Strang and James Goodwin, as trustees as aforesaid, to execute such instrument as shall be necessary to carry out the purpose aforesaid, and to comply with the terms of the said constitution
40 and law in such manner as that said endorsement shall operate as a lien or mortgage on said property of said Macon & Brunswick Railroad Company prior to the lien of said mortgage to us, as trustees above mentioned: Now, therefore, in consideration of the premises, and of one dollar to each of us in hand, the receipt of which is hereby acknowledged, we, Samuel A. Strang and James J. Goodwin, trustees as aforesaid, do hereby subordinate and postpone the lien of said indenture of mortgage made by the Macon & Brunswick Railroad Company to us as trustees, dated the first day of September, one thousand eight hundred and sixty-eight, in such manner and to such extent that the endorsement of the State of Georgia upon the bonds of the said Macon & Brunswick Railroad Company, to the extent of three thousand dollars a mile, being *being* six hundred thousand dollars ($600,000) in all, authorized by the act of the legislature of the State of Georgia, passed the 27th day of October, 1870, entitled "An act to

amend an act to extend the aid of the State to the completion of the Macon & Brunswick Railroad, and for other purposes," shall
41 operate as a *a* lien or mortgage on said property of said Macon and Brunswick Railroad Company prior to the lien of said mortgage executed and delivered to us as trustees, so as to comply with the terms of the constitution of the State of Georgia and the law of such State authorizing such endorsement. But the said mortgage so executed and delivered to us shall continue to be held valid and in full force according to the terms and tenor thereof, subject only to the lien of the endorsement of the State of Georgia of the said bonds of the said Macon & Brunswick Railroad Company for ten thousand dollars a mile and for three thousand dollars a mile in addition thereto.

In witness whereof we have hereunto set our hands and seals this first day of November, one thousand eight hundred and seventy.

SAM'L A. STRANG. [L. S.]
JAMES J. GOODWIN. [L. S.]

Sealed and delivered in presence of—
E. K. GOODWIN.
EDWIN F. COREY.

STATE OF NEW YORK,
City and County of New York, ss:

42 Be it remembered that on this 19th day of December, A. D. 1870, before me, the undersigned, Edwin C. Corey, a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority and under the laws of the State of Georgia, to take the acknowledgement of deeds, etc., to be used or recorded therein, personally appeared Samuel A. Strang and James J. Goodwin, to me personally known to be the individuals named in and who executed the foregoing instrument, and severally acknowledged that they executed the same for the purpose therein named and mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year aforesaid.

[SEAL.] EDWIN F. COREY,
Commissioner.

EXECUTIVE DEPARTMENT,
Atlanta, Ga., August 23rd, 1877.

I, I. W. Avery, secretary of the executive department, do hereby certify that the above and foregoing is a true and correct copy of a paper executed by Sam'l A. Strang and James J. Goodwin, trus-
43 tees of second mortgage bonds of the Macon & Brunswick Railroad Company, dated September 1st, 1868, and marked "indenture of postponement and release," which said paper is now of file in this department.

In witness whereof I have hereunto set my hand and affixed the seal of the executive department this the day and year first above written.

[SEAL.] I. W. AVERY,
Sec'y Executive Department.

EXHIBIT C.

STATE OF GEORGIA.

No. 8.] UNITED STATES OF AMERICA. [$1,000.

Macon & Brunswick Railroad Company.—First and only mortgage bond.

The Macon & Brunswick Railroad Company hereby acknowledge itself indebted to his excellency Charles J. Jenkins, as governor of the State of Georgia, and to his successors in office, or to the bearer hereof, in the sum of one thousand dollars lawful money of the United States of America, to be paid twenty years after date, at the office of
44 the company or its agency, with interest thereon at the rate of seven per centum per annum, payable semi-annually, on the presentation and surrender of the annexed coupons as they severally become due, and in case of non-payment, the governor of the State of Georgia is authorized to seize and take into possession the railroad belonging to said company, extending from the city of Macon to the city of Brunswick, Georgia, including the branch-road to Hawkinsville, the main road and branch together being about one hundred and ninety-five miles, together with all the appurtenances and equipments of the same, and dispose of and sell the same and apply the proceeds to the payment of this and other bonds of said company having an equal and like lien as this bond, together with all interest that may be due and unpaid thereon, as he is authorized and directed to do by an act of the general assembly of the State of Georgia, and of certain resolutions of said legislature explanatory thereof; said act and said resolutions approved by the governor on December 4th, A. D. 1866.

This bond is one of a series, amounting in the aggregate to one
45 million nine hundred and fifty thousand dollars ($1,950,000), and consisting of fifteen hundred bonds, each for five hundred inclusively, also of nine hundred bonds, each for five hundred dollars, numbered from one to nine hundred, inclusively; and all of said 2,400 bonds, in the aggregate amounting to $1,950,000, have the same and equal lien and mortgage, secured as above recited; also, by a sinking fund of two per cent. per annum on the amount of said bonds, to be invested in bonds of the State of Georgia, and by the endorsement of the State of Georgia on each and all of said bonds, as will more fully appear by reference to said act and resolution of the general assembly of the State of Georgia, assented to December 4th, 1866. It is agreed by the said company with each successive holder of this bond that, in case of any default in the payment thereof, the said company will waive, and hereby waives, the benefit of any extension, stay, or appraisement laws now existing, or which may hereafter exist. This bond shall pass by delivery or by transfer on the books of the
46 company, after a registration of ownership, certified hereon by the transfer agent of the company, shall be valid unless the last transfer be to bearer, which shall restore transferability by delivery; but this bond shall continue subject to successive registration and transfer to bearer as aforesaid, at the option of each holder. This bond shall not become obligatory until it shall have been endorsed the governor of the State of Georgia.

In witness whereof the said company have caused its corporate seal to be hereto affixed, and the same to be attested by the signature of its president and secretary, and has also caused the coupons hereto an-

nexed to be signed by its secretary, at Macon, Georgia, on this the twenty-fifth day of February, in the year eighteen hundred and sixty-seven.

GEO. H. HAZLEHURST,
President.

[SEAL.]

ROBERT SCHMIDT,
Secretary.

To the above bond are attached twenty-one coupons, numbered from twenty to forty, inclusively, one of which coupons is in the fol-
47 lowing words and figures, to wit:

No. 8.

The Macon & Brunswick Railroad Company, Georgia, will pay the bearer, at their office, or at their agency in the city of New York, thirty-five dollars, on the first day of January, 1877, for interest on bond (No. 20).

$35.00.] R. SCHMIDT, *Sec'y.*

Endorsements.

EXECUTIVE DEPARTMENT,
Milledgeville, Ga., January 1st, A. D. 1867.

By virtue of authority of an act of the legislature of Georgia, and of the resolutions of same, both assented to December 4th, A. D. 1866, and which have been accepted by the Macon & Brunswick Railroad Company, this bond is endorsed by the State of Georgia.

CHARLES J. JENKINS,
Governor of the State of Georgia.

Done by the governor.

N. C. BARNETT,
Secretary of State.

This bond is payable and transferable only on the books of this
48 company to the order of Ruth M. Brown, guardian for Nannie Brown, Ruth Brown, and Sarah N. Brown, minors, orphans of W. J. Brown, deceased.

Macon, March 20th, 1871.

F. EMMET,
Sec'y & Treas.

Endorsement.

Macon & Brunswick Railroad Company, of the city of Macon, State of Georgia. First-mortgage bond, and also secured by endorsement of the State of Georgia. (No. 8.) $1,000. Dated February 25th, 1867. Principal payable twenty years after date. Interest seven per cent., payable January 1st and July 1st, at the office of the company or agency in New York. This bond is transferable by delivery or on the books of the company. Transferability may be restrained by resignation.

EXHIBIT D.

(Copy of bond.)

UNITED STATES OF AMERICA,
State of Georgia:

$1,000.] THE MACON & BRUNSWICK RAILROAD CO.

Know all men by these presents that the Macon & Brunswick
49 Railroad Company is indebted to Morris K. Jesup, of the city of New York, or bearer, in the *in the* sum of one thousand dollars, lawful money of the United States of America, which the said Macon and Brunswick Railroad Company promises to pay to the said Morris K. Jessup, or to the bearer thereof, on the 1st day of November, one thousand nine hundred, at the agency of the company, in the city of New York, with interest thereon from the first day of November, 1870, at the rate of seven per centum per annum, payable semi-annually, free of government tax, imposed or to be imposed, at the agency of the company, in the city of New York, on the 1st day of May and November in each year, on the presentation and surrender of the annexed coupons as they severally become due; and in the case of the non-payment of any half-yearly installment of interest which shall have become payable and shall have been demanded, if such default shall continue for six months after the maturity of the said installment, the principal of this bond shall forthwith become due and payable. It is agreed
50 by the said Macon & Brunswick Railroad Company with each successive holder of this bond that in case of any default in the payment thereof the said company will waive, and hereby waives, the benefit of any extension, stay, or appraisement laws no' existing or which may hereafter exist. This bond shall pass by delivery or by transfer on the books of the company, in the city of New York, and at any other place which the company determine, after a registration of ownership, certified thereon by the transfer agent of the company. No transfer except upon the books of the company shall be valid, unless the last transfer be to bearer, which shall restore transferability by delivery; but this bond shall continue subject to successive registration and transfer to bearer as aforesaid at the option of each holder. This bond is one of a series to the extent of $3,000 per mile of the Macon and Brunswick Railroad Company, endorsed by the State of Georgia in accordance with an act of the legislature passed October 29th, 1870.

In witness whereof the said Macon and Brunswick Railroad
51 Company has caused its common seal to be affixed, and the same to be attested by the signatures of its president and secretary, and has also caused the coupons hereto annexed to be signed by its treasurer on the 1st day of November, in the year 1870.

GEO. H. HAZLEHURST,
President.

[SEAL.] A. EMMET, *Secretary.*

Coupons attached, of which eight, from November 1st, 1873, inclusive, are due and unpaid, payment thereof having been demanded and refused more than six months prior to the filing of this bill.

ATLANTA, GA., *November 1st*, 1870.

By virtue of authority of the act of the legislature of Georgia, passed 27th of October, 1870, this bond is endorsed by the State of Georgia.

RUFUS B. BULLOCK,
Governor of the State of Georgia.

Done by the governor.

DAVID G. COTTING, [SEAL.]
Secretary of State.

EXHIBIT E.

52 GEORGIA, *Bibb County:*

Know all men by these presents that the Macon and Brunswick Railroad Company, under authority given its president and treasurer by a resolution of its board of directors, passed June 28th, 1873, does by these presents, for and in the consideration of the sum of ten dollars to the said company, in hand paid, and for the purpose of securing the payment of the fare-tickets or change-bills issued by said company, sell, bargain, alien, and convey unto the governor of said State and his successors in office; or if his excellency J. M. Smith, the present governor, shall decline to act, then to Lewis N. Whittle and Stephen Collins, or survivor of them, all the property, rights of property of all and every kind, more particularly set forth and described in a schedule and description hereunto attached and made a part of this deed, together with all the rights, immunities, and appurtenances to the same, and to each and all of the same, in anywise appertaining or belonging, in full title or estate, but for the uses and purposes hereinafter set forth; that is to say, to take charge and possession of
53 the same, and each and all of the same, as trustee, for the purposes aforesaid, and to sell the same at such time and place, upon such terms and manner, at public or private sale, in the discretion of such trustee or trustees for the time being, and apply the proceeds to the redemption and payment of all the fare-tickets or change-bills which have been issued by said company. Any sum or property that may remain undisposed of after paying of same and the expenses of this conveyance and said sales are to revert to and become the property of the said Macon & Brunswick Railroad Company, as if this deed had never been made.

In witness of all of which said Macon & Brunswick Railroad Company have caused this deed to be signed by its president and countersigned by its secretary and treasurer this June 30th, A. D. 1873, and the corporate seal of the company hereto attached.

GEO. H. HAZLEHURST,
President M. & B. R. R.
F. EMMET, [L. S.]
Sec'y & Treas.

Signed, sealed, and delivered in the presence of the undersigned this June 30th, 1873.

T. J. FUERRY.
CHRISTOPHER J. WILSON,
Notary Public, Bibb Co., Ga.

54 Schedule and description of property transferred to provide for redemption of fare-bills of the Macon and Brunswick Railroad Company, viz:

Deed 1.

440 shares of the Southern and Atlantic Telegraph Company stock, certificate No. 1009, $11,000.

Deed 2.

B. B. Dykes to M. & B. R. R.: Eight lots ofland, known and desig. nated as lots numbered 156, 157, 144, 145, 146, 127, 126, and 124, all in the 21st district of Pulaski County, and said to contain, each lot, 202½ acres, equal to 1,620 acres in all, $3,000.

Deed 3.

R. C. King et al. to M. & B. R. R.: All that tract or parcel of land in the county of Glynn, and State of Georgia, that is to say, the tract or parcel of marsh land butting and fronting on Turtle River from the south end of Dennis Folley to the mouth of Plantation Creek, and extending from the water back between the said creek and the town-commons line of the city of Brunswick, which said land was granted by William Schley, governor of the State of Georgia, to John Piles, by a grant or patent dated the seventeenth day of May, in the year 1837;
55 by the said Piles conveyed to Henry King, on the 25th day of May, A. D. 1837, being the land on which the wharf of the said Macon and Brunswick Railroad Company has been placed, $3,500.

Deed 4.

City of Macon to L. N. Whittle, trustee M. & B. R. R.: Half of that lot or parcel of land situate, lying, and being in the county of Bibb and city of Macon, and known and distinguished on the plan of said city as lots numbers 3 and 4, in block thirty-seven (37), and as the guard-house property, and containing one acre, more or less, $8,000.

Deed 5.

M. Wright, adm'r, to M. & B. R. R.: All those certain lots or parcels of land situate, lying, and being in the city of Macon, and State of Georgia, situated on square 55, known as lots 1 and 2, containing one acre of land, more or less; also, part of lot No. 3, in said square, containing one-third of an acre, more or less, more particularly described in deed from one J. R. Bates to John Doyle, $2,500.

Deed 6.

City of Macon to M. and B. R. R.: All that parcel or portion of land situate in the city of Macon, county of Bibb, State of Georgia,
56 and known in the plan of said city as Camp Oglethorpe, containing ten acres, more or less, and bounded by the following lines: Beginning at a point on the southern corner of Pine and Seventh streets, running down the line of Pine street in a southeasterly direction of 670 feet; thence at right angles to said line a distance of 525 feet to the line of Hawthorn street; thence along said line in a northwesterly direction a distance of 717 feet to the corner of Hawthorn and Seventh streets; thence along the line of Seventh street a distance of 775 feet to the aforesaid starting point, $5,000.

Deed 7.

J. C. Plant to M. & B. R. R.: All the following lots of land situate, lying, and being in the city of Macon, county of Bibb, State of Georgia, known and distinguished in the plan of survey of the southwest common of said city as lots Nos. 1 and 7, in block 10, containing each one-half acre, more or less, $600.

Deed 8.

J. C. Plant to M. & B. R. R.: All that lot or parcel of land known in the plan of the city of Macon as lot No. 3, in square number 13, with all buildings thereon, which has been used as a mission church
57 for some years past. Said lot contains one-half acre, more or less, $1,000.

Deed 9.

Summerlyn to M. & B. R. R.: All that tract or parcel of land situate, lying, and being in the county of Wayne, in the third district of the said county of Wayne, being lot number 217, originally granted to Allen Tucker, containing 490 acres, more or less, bounded on the north by lot 218, on the east by lot 225, on the south by lot 216, and on the west by lot 170, $600.

Deed 10.

J. A. Anderson to M. & B. R. R.: All that tract or parcel of land situate, lying, and being in the 21st district of originally , now Pulaski County, Georgia, known and distinguished in the plan of said district as lot No. 155, and adjoining the lands now owned by the Macon & Brunswick Railroad Company, on the north or the west by the lands of E. E. Crocker and Daniel Fain, on the south by the lands of Mrs. Martha Graham, and on the east by the land of the Macon & Brunswick Railroad Company and the Macon & Western Railroad Company, containing 202½ acres, $800.

Deed 11.

Amount due by Central Railroad & Banking Company, $28,800.

58 *Deed* 12.

Equipment bonds Nos. 290 to 300, both inclusive, for $500 each, now in the hands of M. K. Jesup & Co., of New York, $5,500.

Deed 13.

Supplementary bonds endorsed by the State, Nos. 546 to 548, both inclusive, for $1,000 each, now in hands of M. K. Jesup & Co., New York, $3,000.

MACON, GA, *June 30th*, 1873.

The above foregoing is the schedule and description of property and rights of property alluded to and embraced in deed of this date, hereto attached, to secure the redemption and payment of the fare-tickets or

change-bills issued by the Macon & Brunswick Railroad Company, as provided by resolution of the board, this June 30th, 1873.

GEO. H. HAZLEHURST,
President M. & B. R. R. Co.

[L. S.] F. EMMET, *Sec'y & Treas.*

The amount has been received by the Macon & Brunswick Railroad Company, and has been applied to cancelling the like amount of fare-tickets. The eleven equipment bonds are now in the hands of L. N. Whittle and Stephen Collons, trustees. The three supplementary bonds have been exchanged for three first mortgage bonds, Nos.
59 291 to 293, both inclusive, now in the hands of L. N. Whittle and Stephen Collins, trustees.

GEORGIA, *Bibb County:*

CLERK'S OFFICE, SUPERIOR COURT.

Recorded in Book X, pages 45, 44, 43, and 42, October 11th, 1873. Filed same day.

A. B. ROSS, *Clerk.*

ATLANTA, GA, *July 2nd*, 1873.

My official obligations to the public forbid that I should accept the trust declared in the within deed.

JAMES M. SMITH.

EXHIBIT F.

STATE OF GEORGIA:

EXECUTIVE DEPARTMENT,
Atlanta, Ga., March 24th, 1875.

Dr. E. A. FLEWELLEN,
Macon, Ga.:

MY DEAR SIR: I am just out of a pretty serious attack of illness, and am at last able to creep down to the office. It started by a boil in the nose, which*ed* seemed to develop*e* every ailment in my system. In fact, I am completely broken down by the complicated and harassing labors of the session, and needed only the slightest send-off to have a bad spell of sickness; will get all right, I hope. I think I will advertise the Macon & Brunswick Railroad property for sale the first Tuesday in June next. I fear, however, that the time will not be as
60 favorable as a later day would be, but I am weary of the road, and the whole villainous business, and, as the legislature has indicated the first of June for the sale, I am inclined to conform to their wishes. Have you seen Hardeman since the occasion you mentioned? I shall be in Macon soon. Indeed I must get away from my office a little, as the close confinement is telling on my health. I hope to be able to go down the road to Brunswick when I visit you. March 25—Compelled to break off to receive a few vistors having designs on the treasury, a very unusual circumstance. Have your letter this morning. About as I expected of Whittle; he must settle up. Please see to it he does so. I long for the time when I shall be free from Whittle, Hazlehurst & Co.

Yours, truly,

JAMES M. SMITH.

EXHIBIT G.

THURSDAY, *June 3d*, 1875.

EXECUTIVE DEPARTMENT,
Atlanta, Ga., June 3d, 1875.

Know all men by these presents that whereas, by the first section of an act entitled "An act to extend the aid of the State to the completion of the Macon and Brunswick Railroad, and for other purposes," approved December 3d, 1866, the endorsement of the State was
61 placed upon the bonds of said company to the extent of ten thousand dollars per mile of the road of said company, making in the aggregate one million nine hundred and fifty thousand dollars. And whereas, by second section of said act, it was provided that in the event any bond or bonds endorsed as aforesaid by the State, or the interest due thereon, should not be paid by said railroad company at maturity or when due, it should be the duty of the governor, upon information of such default by any holder of said bond or bonds, to seize and take possession of all the property of said railroad company and sell the said road and its equipments, and other property belonging to said company, in such manner and at such time as in his judgement might best subserve the interest of all concerned.

And whereas the governor, upon information received by him, did, on the second day of July, 1873, issue his proclamation, wherein, after reciting in effect that he had received information that Anna A. Green and other persons therein named were the holders of the bonds of said company, issued and endorsed as aforesaid, in the several amounts therein set forth, and that they had respectively pre-
62 sented the coupons for the semi-annual interest on said bonds due July 1st, 1873, to said company for payment, and that he had on that day, by virtue of the power conferred by said act, seized and taken possession of all the property of said railroad company, to the end that the same, together with all the earnings of the said railroad, might be held, applied, and disposed of as was required by the provisions of said act, and appointed George H. Hazlehurst, of the county of Bibb, the agent of the State, to receive, hold, possess, manage, and control all the property of said company for the purposes thereinbefore stated. And whereas the said George H. Hazlehurst, in obedience to said proclamation, did take possession of all the property of said company hereinafter particularly mentioned and described, and as the agent of the State did turn over the same to Edward A. Flewellen, duly appointed to succeed him in said agency, who, by reason thereof, came into the possession, management, and control of the same, as agent aforesaid.

And whereas, by an executive order dated April 5th, 1875, the said Edward A. Flewellen was instructed and directed to sell all the property seized and held as aforesaid, to the highest bidder, at public
63 outcry, at the depot of said rail *rail*road company, in the city of Macon, between the hours of ten o'clock a. m. and two o'clock p. m. of the first Tuesday in June then next, such sale to be made for cash, for bonds of this State, or the first mortgage bonds of said company, endorsed under the act aforesaid. And whereas the said Edward A. Flewellen, after due and proper advertisement thereof, did expose to sale in the terms of said last-mentioned order the following-named and described property of the said railroad company held by him as agent as aforesaid, viz, the Macon & Brunswick Railroad, extending

from the city of Macon to Brunswick, Glynn County, Georgia, and the branch road, extending from Cochran to Hawkinsville, a distance of ten miles; also about five miles of side-track on the main line of said railroad, and about two miles of extension in the city of Brunswick, together with the franchises, equipments, and other property of said company, consisting of its road-bed, superstructure, right of way, motive power, rolling-stock, depots, freight and section-houses, machine-shops, carpenter-shops, grounds, furniture, machinery, tools and materials connected therewith; also tracts or parcels of land, numbered one, three, and four, in district twenty, and numbers one hundred and
64 twenty-four (124), one hundred and twenty-six (126), one hundred and twenty-seven (127), one hundred and forty-four (144), one hundred and forty-five (145), one hundred and forty-six (146), one hundred and fifty-one (151), one hundred and fifty-five (155), one hundred and fifty-six (156), one hundred and fifty-seven (157), in district twenty-one, in Pulaski County, in said State, and containing each two hundred and two and a half acres; also a certain tract or parcel of land in the city of Brunswick, known as the "wharf property" of the Macon and Brunswick Railroad Company; also one undivided half of lots numbers three and four, of block thirty-seven, in the city of Macon, known in the locality as the guard house; also city lots numbers one and two, and a portion of number three, in square number fifty-five, in said city of Macon; also a tract or parcel of land, in said city of Macon, there known as "Camp Oglethorpe," containing ten acres, more or less; also city lots numbers one and seven, in block number ten, in southwest Macon; also city lots numbers three and five, in square number thirteen, in said city of Macon, with the buildings thereon; also tract or parcel of land number two hundred and seventeen, in district three, in
65 Wayne County, Georgia, and four hundred and forty shares of stock in the Southern and Atlantic Telegraph Company, certificate number 1009.

And the whole of said property, having been offered as aforesaid, was then and there knocked off to the State of Georgia at and for the bid and sum of one million dollars; the said State of Georgia having then and there become, through and by the governor thereof, the highest and best bidder for, and by virtue of the law in such cases made and provided the purchaser of, such property.

Wherefore, this indenture witnesseth that I, James M. Smith, as governor of said State, for and in consideration of the premises, have this day granted, bargained, sold, aliened, and conveyed, and by these presents do grant, bargain, sell, alien, and convey, all and singular, the lands, rights, property, and effects hereinbefore mentioned and described, to the said the State of Georgia, to have and to hold the same, and each and every portion and parcel of the same, with every right and privilege thereunto in anywise belonging, in as full and ample manner as the same were owned, held, possessed, or enjoyed by the said Macon & Brunswick Railroad Company.

In witness whereof I, James M. Smith, as governor aforesaid,
66 have hereunto set my hand and affixed the seal of the executive department the day and year first above written.

[SEAL.] JAMES M. SMITH,
Governor.

Signed, sealed, and delivered in the presence of—
J. W. WARREN,
S. C. WILLIAMS,
Notary Public, Fulton County.

And afterwards, to wit, on the 29th day of September, A. D. eighteen hundred and seventy-seven, the following proceedings were had, to wit:

Subpœna in equity for southern district.

The President of the United States of America to the Macon & Brunswick Railroad, Edward A. Flewellen, W. A. Loften, and George S. Jones, directors of the Macon & Brunswick Railroad; J. W. Renfroe, treasurer of the State of Georgia; Alfred H. Colquit, governor of the State of Georgia; the First National Bank of Macon, and John H. James, greeting:

67 For certain causes offered before the judges of the circuit court of the United States for the southern district of Georgia, in equity, you and every one of you are hereby commanded and strictly enjoined that, laying all other matters aside, and *and* notwithstanding any other cause, you personally be and appear at the clerk's office of the said court, in the city of Savannah, at rules to be had on the first Monday in November next, to answer to those things which shall then and there be objected to you in a bill for discovery, relief, &c., filed by the said complainant, and to do further and receive what the said court shall have considered in that behalf; and this you may in no wise omit under penalty of five hundred dollars; and have here this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Savannah, Georgia, this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and seventy-seven.

WILLARD F. WARNER,
Deputy Clerk.

MEMORANDUM.—The defendants are to enter their appearance in the suit above stated, in the clerk's office, on or before the day at
68 which this writ of subpœna is returnable; otherwise the bill may be taken pro confesso.

WILLARD F. WARNER,
Deputy Clerk.

And afterwards, to wit, on the 10th day of October, A. D. 1877, came the marshal for the districts of Georgia, and made the following returns to foregoing process, to wit:

Return of marshal.

I have served a copy of the within subpœna upon Geo. S. Jones, director M. & B. R. R., & I. C. Plant, president First Nat'l Bank of Macon, Ga., personally, at Macon, Ga., on the 4th day of October, 1877, and upon Geo. W. Adams, gen'l sup't M. & B. R. R., personally, & on W. A. Lufton, director M. & B. R. R., by leaving a copy at his usual place of residence in the city of Macon, this 8th day of October, 1877.

The return of—

WM. H. SMYTH,
U. S. Marshal,
By A. E. SEIFERT, *Deputy.*

$24.32.

I have served a copy of the within subpœna in equity upon Edward A. Flewellen, one of the directors of the M. & B. R. R. Co., by leaving

a copy at his usual place of residence in Macon, Ga., this 9th day of October, 1877.

The return of—

WM. H. SMYTH,
U. S. Marshal,
By A. E. SEIFERT, *Deputy.*

69

And afterwards, to wit, on the said 29th day of September, A. D. 1877, the following proceedings were had, to wit:

Subpœna in equity for northern district.

The President of the United States of America to the Macon & Brunswick Railroad; Edward A. Flewellen, W. A. Lofton, and George S. Jones, directors of the Macon and Brunswick Railroad; J. W. Renfroe, treasurer of the State of Georgia; Alfred H. Colquitt, governor of the State of Georgia; The First National Bank of Macon, and John H. James, greeting:

For certain causes offered before the judges of the circuit court of the United States for the southern district of Georgia, in equity, you, and every one of you, are hereby commanded and strictly enjoined that, laying all other matters aside, and notwithstanding any other excuse, you personally be and appear at the clerk's office of the said court, in the city of Savannah, at rules to be had on the first Monday of

70

November next, to answer to those things which shall then and there be objected to you in a bill for discovery, relief, &c., filed by the said complainant, and to do further and receive what the said court shall have considered in that behalf, and this you may in nowise omit under penalty of five hundred dollars; and have here this writ.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Savannah, Georgia, this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] WILLARD F. WARNER,
Deputy Clerk.

MEMORANDUM.—The defendants are to enter their appearance in the suit above stated, in the clerk's office, on or before the day at which this writ of subpœna is returnable; otherwise the bill may be taken pro confesso.

WILLARD F. WARNER,
Deputy Clerk.

And afterwards, to wit, come the U. S. marshal for the districts of Georgia, and made the following returns to the foregoing process, to wit:

71 *Return of marshal.*

I hereby certify that I have this fifth day of October, 1877, at Atlanta, Ga., in my district, served the within subpœna in equity upon the within named Alfred H. Colquitt, governor of the State of Ga., & upon J. W. Renfroe, treasurer of said State, and upon John H. James, by personally handing to each of them a copy thereof.

Atlanta, Ga., Oct. 5th, 1877.

W. H. SMYTH,
U. S. Marshal.

$24.00.

And afterwards, to wit, on the 5th day of November, A. D. 1877, the following proceedings were had, to wit:

Appearance.

[The Macon & Brunswick Railroad, Edward A. Flewellen, William A. Lofton, and George S. Jones, directors; J. W. Renfroe, treas'r; and A. H. Colquitt, governor, &c.]

STATE OF GEORGIA:

ATLANTA, GA., *Nov.* 30, 1877.

JAMES MCPHERSON, Esq.,
Clerk U. S. Circuit C't, Savannah, Ga.:

72 DEAR SIR: Please enter my appearance for the defendants on Monday next in case of George W. Cunningham, complainant, and the Macon & Brunswick Railroad, defendants. I represent all the defendants, excepting the National B'k & J. H. James.

I shall object to the jurisdiction of the court and enter an appearance without waiving any right to make that objection at the proper time, and wish this letter preserved as evidence thereof. Please enter my name as I sign it below for those of the defendants above stated.

Very truly y'rs,

R. N. ELY.

On filing precept in this cause, and on motion of Robert N. Ely, esq., ordered that his appearance as solicitor for defendants the Macon & Brunswick Railroad, Edward A. Flewellen, William A. Lofton, and George S. Jones, directors; J. W. Renfroe, treas'r; and A. H. Colquitt, governor, &c., herein be, and the same hereby is, entered, and that the cause be now docketed for said defendants.

73 Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fifth day of November, A. D. 1877.

[SEAL.] JAS. MCPHERSON, *Clerk.*

And afterwards, to wit, on the fifth day of November, A. D. 1877, the following proceedings were had, to wit:

Appearance for I. C. Plant.

MACON, GA., *Nov. 5th*, 1877.

To JAMES MCPHERSON, Esq.,
Clerk U. S. Dist. C't:

Put in appearance for I. C. Plant in case of George A. Cunningham against Macon and Brunswick Railroad and others.

WM. A. LOFTON.

On filing precept in this cause, and on motion of Wm. A. Lofton, ordered that his appearance as solicitor for defendant, I. C. Plant, herein be, and the same hereby is, entered, and that the cause be now docketed for said defendant.

Witness the honorable Morrison R. Waite, Chief Justice of the
74 Supreme Court of the United States, this fifth day of November, A. D. 1877.

[SEAL.] JAS. MCPHERSON, *Clerk.*

And afterwards, to wit, on the 3rd day of December, A. D. 1877, the following proceedings were had, to wit:

Demurrer and plea of def'ts Flewellen, Lofton & Jones.

Edward A. Flewellen, William A. Lofton, and George S. Jones, three of the defendants, to complainant's above bill of complaint, for cause why the inju'ction, the appointment of the receiver, and the relief prayed for should not be granted, show and plead that these parties and the subject-matters set up in complainant's bill are not within the jurisdiction of, nor can this honorable court take cognizance of them, because it appears in the bill itself, and so is the fact, that these defendants are but nominal parties, having no real interest in the matters set up in said bill, the real parties in interest in this proceeding being the complainant on the one side and the State of Georgia on the other, and these defendants submit that the bill of complaint of the said
75 complainant is but an attempt on the part of said complainant, by indirect means, to begin and prosecute a suit against the State of Georgia.

These defendants have no interest in connection with or control over said Macon and Brunswick Railroad other than as directors thereof, as the agents of & for the State of Georgia, for whom they hold & control it, its franchises and property of every description, and its revenues, as such agents under the laws of Georgia and by the authority thereof, and in no other right, claim, or interest whatever.

That upon the facts set out in said bill and its various allegations, charges, & averments, the complainant is not in equity entitled to the relief prayed for therein against these defendants. These defendants further submit to this honorable court that there is no law or other authority in this State or elsewhere authorizing or requiring the State of Georgia, directly or indirectly, by herself or by her agents, to become or be made a party defendant to this proceeding, without and against her consent, nor would these defendants as agents of the said State as aforesaid, and acting for the said State aforesaid, as they in fact
76 are, be justified or authorized under the laws of this State, in producing any deed or record in their control as said agents, and they have none other cause or make further answer in the premises, so as to commit the State of Georgia, or her interest and rights, to this adjudication of this honorable court in this proceeding without her consent, which she has not, but refused to give, and they protest most respectfully against being compelled so to do.

Wherefore these defendants ask the judgment of this honorable court that they be hence dismissed with their re'sonable costs; and they will ever pray, &c.

R. N. ELY &
R. F. LYON,
Def'ts' Sols.

UNITED STATES OF AMERICA,
State of Georgia, County of Bibb:

Personally appeared Edward A. Flewellen, William A. Lofton, and George S. Jones, who, being duly sworn, say on oath that the facts set

forth on the three foregoing pages are true in substance and in fact, and is not interposed for the purpose of delay.

E. A. FLEWELLEN.
WM. A. LOFTON.
GEO. S. JONES.

77 Sworn to before me this 14th day of November, 1877.
[SEAL.] ROB'T A. NISBET,
U. S. Com'r So. Dist. of Ga.

We certify that in our opinion the foregoing plea of defendants is well founded in point of law.
3 Dec'r, 1877.

R. F. LYON &
R. N. ELY,
Def'ts. S'Vrs.

And afterwards, to wit, on the 3rd day of December, A. D. 1877, the following proceedings were had, to wit:

Plea of defendant Renfroe.

One the defendants to said bill, John W. Renfroe, for cause against the granting of said inju'ction and appointing a receiver, showeth, 1st, that he has no control over nor connection with said Macon & Brunswick Railroad, and that whatever payments he has made or acts he has done, or charged in said bill, have been done by virtue of his of-
78 fice as treasurer of the State of Georgia, under the laws of said State; 2nd, that any collections made by him out of assets formerly belonging to said Macon and Brunswick Railroad, were made by him as such treasurer and not otherwise, and have been deposited in the treasury of this State, and this defendant has no control over the same excepting such *or* is conferred by the laws of said State, and this defendant has no interest whatever in the matters touching said suit excepting as above stated.

ROBERT N. ELY,
R. F. LYON,
Defendants' Solic'ts.

UNITED STATES OF AMERICA,
State of Georgia, County of Fulton:

Personally appeared John W. Renfroe, who, being duly sworn, says on oath, that this his foregoing plea is true in point of fact, and is not interposed for delay.

J. W. RENFROE, *Tr.*

Sworn to and subscribed before me this 1st day of December, 1877.
A. E. BUCK,
U. S. C. C. Com.

We certify that in our opinions the foregoing plea is well founded in point of law.
79

R. F. LYON &
R. N. ELY,
Def'ts' Sol'rs.

And afterwards, to wit, on the 3rd day of December, A. D. 1877, the following proceedings were had, to wit:

Demurrer of A. H. Colquitt.

The demurrer of Alfred H. Colquitt, one of the defendants, to the complainant's above bill of complaint.

The defendant, by protestation, not confessing all or any of the matters and things in the said complainant's bill of complaints contained to be true in such manner & form as the same is therein set forth and alleged, and doth demur to said bill, & for cause of demurrer says: That the honorable court not take cognizance of the matters and things set up in said bill as against this defendant, because it doth appear on the face thereon that this defendant has no personal interest in the same, but that the same is an attempt to make the State of Georgia, through this defendant as the governor thereof, and to make it a party to such
80 proceeding, so as to bind it by the judgement and decision of this honorable , and this defendant respectfully submits that this court cannot take jurisdiction of said matters and things as against this defendant for any such purpose.

Wherefore, for divers good cause of demurrer appearing in the said bill, the defendant doth demur thereto and humbly demands the judgement of the court, whereby he demands the judgement of the court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

R. N. ELEY &
R. F. LYON,
Def'ts' Sol'rs.

We certify that in our opinion the foregoing plea is founded on point of law.

3rd Dec., 1877.

R. N. ELEY &
R. F. LYONS,
Def't's Sol'r's.

And afterwards, to wit, on the 4th day of December, A. D. 1877, the following proceedings were had, to wit:

81 *Plea of Alfred H. Colquit, one of the defendants.*

One of the defendants to said bill, Alfred H. Colquit, for cause against the granting of said injunction and appointing a receiver, showeth:

1st. That the subject of this bill is not within the jurisdiction of this honorable court, because it appears from the bill itself that this defendant is but a nominal party and has no interest, the real parties to the controversy being the said complainant on the one side and the State of Georgia on the other; and this defendant submits that the bill of complaint is but an attempt on the part of a citizen of Virginia, by indirect means, to begin and prosecute a suit against the State of Georgia. This defendant has no connection with or control over said Macon and Brunswick Railroad other than that arising by virtue of his office as governor of the State of Georgia. The said railroad, including its franchises and property of every description was seized and sold by

the late executive of this State on account of the default of pay-
82 ment of interest on a series of bonds amounting to one million nine hundred and fifty thousand dollars, which had been indorsed for said road by said State. The authority of this seizure and sale was conferred by the same act of the general assembly of this State that authorized the said indorsement. At this sale the said *the said* executive, on behalf of and in the name of said State, become by vir' of a like provision of law the purchaser of said road, including its franchises and property of every kind, so that the State of Georgia is now legally the sole and exclusive owner thereof, and in the full and complete possession thereof by the legally constituted agents of said State, to wit: Edward A. Flewellen, William A. Lofton, and George S. Jones, acting as managers and directors of said road, and controlling the same and all the property connected therewith. 2nd. That the subject of this bill is not within the jurisdiction of a court of equity, because, by the case made, the complainant is not entitled to any equitable relief whatever, as against this defendant. 3rd. This defendant further submits to this honorable court that there is no law of this State authorizing
83 the State of Georgia to become a party defendant to this litigation, nor would this defendant be justified under the laws of this State in producing any deeds or other records of file in the executive department, to be used as evidence by the complainant.

ROBERT N. ELEY,
R. F. LYON,
Def'nd't's Sol'rs.

UNITED STATES OF AMERICA,
State of Georgia, County of Fulton:

Personally appeared Alfred H. Colquitt, who, being duly sworn, says on oath that this, his foregoing plea, is true in point of fact, and is not interposed for the purpose of delay.

ALFRED H. COLQUITT.

Sworn to and subscribed before me this 3rd day of December, 1877.
A. E. BUCK,
U. S. C. C. Comm.

And afterwards, to wit, on the 4th day of March, A. D. 1878, the following proceedings were had, to wit:

Order setting case down for hearing.

84 Upon motion of complainant's counsel in the above-stated case, ordered that said case be set down for argument upon the plea and demurrers filed by the defendants on the fifteenth day of April, 1878, or as soon thereafter as counsel can be heard.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, at Savannah, in said district, this 6th day of March, A. D. 1878.

[SEAL.] WILLARD F. WARNER,
Deputy Clerk.

85 And arterwards, to wit, on the 23d day of March, A. D. 1878, came John H. James, defendant, by L. I. Glenn and son, his solicitors, and filed his answer in words and figures following, to wit:

Answer of J. H. James.

The separate answer of John H. James to the bill of complaint filed against himself and others in the United States circuit court for the southern district of Georgia, by George A. Cunningham.

Respondent, reserving the benefit of all legal exceptions to the many errors, uncertainties, and imperfections in complainant's bill contained, for answer thereto, or to so much and such parts thereof as he believes it is necessary for him to answer, says:

Answer to first interrogatory. It is true that under the act of December 3d, 1866, the Macon and Brunswick Railroad Company
86 did issue bonds to the amount of $1,950,000, which were endorsed by the State and afterwards put in circulation.

Answer to 2nd interrogatory. And said company did, under said act, as amended by the act of 1870, issue bonds to the amount of $600,000, which were endorsed by the State, and afterwards *and afterwards* put in circulation.

Answer to 3rd interrogatory. The said Flewellen did take charge of said railroad, under the appointment of the governor, after the latter's seizure of the same, as stated in the bill.

Answer to 4th interrogatory. The Macon and Brunswick Company is insolvent, and did cease to pay the coupons on said endorsed bonds more than six months before the filing of this bill, and it has since failed to pay said coupons. I do not know whether said company has any other property than that seized by the governor.

Answer to 5th interrogatory. I do not know whether the
87 Macon and Brunswick Railroad Company executed the mortgage, a copy of which is attached to this bill, marked Exhibit A; nor do I know whether the governor accepted the same, or have it recorded; nor do I know whether the original is now on file in the executive office.

Answer to 6th interrogatory. The governor did sell said railroad, as stated, and buy it in for the State for $1,000,000, and the State has, since said sale, taken up the entire series of bonds herein called the $1,950,000 series, and substituted her own bonds for the same, giving her 6 per cent. bonds for seven per cent. bonds of the road, and the State treasurer now pays the coupons of such substituted bonds as they fall due, in January and July of each year.

Answer to the 7th interrogatory. The governor did announce, in advance of said sale, that he would only take in payment for said
88 railroad cash, State bonds, or first mortgage bonds of said railroad, meaning by the last named the $1,950,000 series, and that these last would only be received at their true market value, which was eighty-eight (88) cents.

Answer to the 8th interrogatory. I do not know that many or any of the holders of the endorsed bonds would have bid a much higher price for the railroad than it brought had they been permitted to pay for it with said endorsed bonds at par.

Answer to the 9th interrogatory. The said Flewellen and others, calling themselves directors of the Macon and Brunswick railroad, are operating said railroad in entire disregard of any interest which the holders of the second series of endorsed bonds may have in the road, and without appropriating any of the earnings of the road to the payment of said bonds or the coupons.

89 Answer to the 10th interrogatory. The Macon and Brunswick

Railroad Company did make default in the payment of the coupons of said second series of endorsed bonds more than six months before the filing of this bill, and has since failed to pay said coupons.

Answer to the 11th interrogatory. I do not know that it is true that the governor in seizing said railroad seized other property belonging to said company not embraced in said mortgages so far as the same operated as a security for the payment of the first series of said endorsed bonds. I do not know whether the governor seized all the property owned by the company at the time of the seizure of the road.

Answer to the 12th interrogatory. I do not know whether any of the property so seized, which was not covered by the mortgages, was bought with the proceeds of the $1,950,000 series of endorsed bonds. I
90 don't know whether any of it was bought with the proceeds of the $600,000 series.

Answer to the 13th interrogatory. I don't know that the property named in the trust deed to L. N. Whittle and others (annexed to this bill as Exhibit E) was acquired by the company after the last endorsement was placed upon the $1,950,000 series, nor do I know whether such property was bought by the company with funds derived from other sources than the proceeds of said last-named series.

Answer to the 14th interrogatory. The fare bills issued by said company were redeemed with the earnings of the road.

Answer to the 15th interrogatory. The property seized by the governor was sold with the railroad and bought in by him in the name of the State for $1,000,000.

Answer to the 16th interrogatory. I do not know whether the bonds, styled in the schedule annexed to said trust-deed to "Whittle and
91 others supplementary bonds endorsed by the State," were exchanged for three (3) of the first mortgage bonds of $1,000.00 each; nor do I know whether said Whittle transferred on the books of the Southern & Atlantic Telegraph Company four hundred and forty shares of stock named in the deed to him, to said Renfroe, nor do I know whether said bonds and stocks are now held by Renfroe. I do not know that said Renfroe denies that complainant in this bill and others, holders of the $600,000 series of endorsed bonds, have any interest in the property transferred by Whittle to him, nor do I know that he draws dividends upon the stock.

Answer to the 17th interrogatory. I do not know that all the other property seized by the governor is now in the hands of said Flewellen and others, nor do I know whether or not they deny all interest of the holders of the second series of endorsed bonds therein.

92 Answer to the 18th interrogatory. I don't know that the First National Bank of Macon hold and claim lots 1 & 7, 10th block, in the city of Macon.

Answer to the 19th interrogatory. I don't know whether not the said Renfroe is in possession of said first mortgage bonds Nos. 291, 292, & 293, each for $1,000; nor do I know whether the 440 shares of stock in the Southern Atlantic Telegraph Company was transferred to said Renfroe by said Whittle, nor do I know in whose name they stand on the books of said company.

Answer to the 20th inter'ogatory. I know nothing about the said railroad company issuing what were called second mortgage bonds to the amount of 1,100,000, or other sum, secured by a mortgage on said railroad & appurtenances, subordinate in rank to the lien in favor of the $1,950,000.

93 I know nothing about any postponement of lien by the trus-

tees or others; I don't know whether the postponement was accepted or not, as I know nothing about it. I do not know whether Exhibit B is a copy of the instrument postponing said lien or not, or that the original of the same is now on file in the executive office. I know nothing about it.

Answer to the 21st interrogatory. I do not know whether or not Exhibits C & D are correct copies.

Answer to the 22d interrogatory. The governor did seize said property as stated, and it was advertised for sale as stated, and the governor in his order, directing said sale, did state the terms of the sale in the language used in said advertisement.

Answer to the 23d interrogatory. I know nothing about the governor being warned by Flewellen that the terms of sale and the
94 time of sale selected were not the best for an advantageous sale; know nothing about the letter referred to.

Answer to the 24th interrogatory. I don't know whether Exhibit S is a copy of the deed made by James M. Smith, as governor of the State of Georgia, nor do I know if the original is now on file in the executive office.

Answer to the 25th interrogatory. I do not know whether coupons of the first series of endorsed bonds to the amount of $76,340.20 were exchanged for the same amount of bonds of the second series. I don't know how much, if any, were exchanged. I know nothing about it.

Answer to the 26th interrogatory. I do not know if all or any of the papers stated in this bill to be in the executive office or in the hands of said Colquitt, as governor, are now in said office or subject to the control of the governor.

Answer to the 27th interrogatory. I do not know what salaries the said Flewellen, Lofton, and Jones receive as directors of the
95 Macon and Brunswick Railroad, nor do I know how they are paid.

And respondent, for further answer, says that he did, but does not now, own any of the State bonds given in exchange for the $1,950,000 series of said endorsed State bonds.

And this defendant denies all, and that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto & not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

L. J. GLENN & SON,
Def'd'ts' Att'ys.

96 UNITED STATES OF AMERICA,
Northern District of Georgia:

In person before me came John H. James, who, being duly sworn, on oath says that the statements made in the foregoing answers are true, to the best of his knowledge, information, and belief.

JOHN H. JAMES.

Sworn to and subsrcibed before me this March 21st, 1879.

A. E. BUCK,
U. S. C. C. Com'r.

And afterwards, to wit, on the 13th day of May, A. D. 1878, the following proceedings were had, to wit:

Order for hearing on demurrer, in vacation.

By consent of counsel, ordered that the argument on the demurrer filed in the above-stated case be heard in vacation at Atlanta, at
97 such time as may be agreed on by the judge who may hear the same & the counsel engaged in the cause.

In open court, May 13th, 1878.

JOHN ERSKINE,
Judge.

And afterwards, to wit, on the 7th day of December, A. D. 1878, the following proceedings were had, to wit:

Decree on demurrer.

This cause came on to be heard upon the separate demurrer of the defendant, Alfred H. Colquitt, and the joint demurrer of the defendants, Edward A. Flewellen, William A. Lofton, and George S. Jones, to the bill of complaint, and was argued by counsel; on consideration whereof, the court being fully advised in the premises, is of opinion that the demurrers of said defendants are well founded in law. It is therefore ordered, adjudged, and decreed that said demurrers be, and the same are hereby, sustained, and the said complainant not asking leave to amend the said bill it is further ordered, adjudged, and decreed that said bill be dismissed as to the said defendants Alfred H. Col-
98 quitt, William A. Lofton, and George S. Jones, at the costs of the complainant, which he is ordered to pay.

Dec. 7th, 1878.

W. B. WOODS,
Judge

And afterwards, to wit, on the 25th day of August, A. D. 1879, the following proceedings were had, to wit:

Application for and allowance of appeal.

To the honorable William B. Woods, judge of the United States circuit court for the southern district of Georgia, to which said cause was returned, and who tried the same:

The petition of George A. Cunningham, the complainant in the above cause, respectfully shews that he is desirious of entering an appeal to the Supreme Court of the United from the decision of your honor against him in said cause; that the amount in which he is interested, and which he is deprived of by said decision, is over five thousand dollars in value; that he does not desire a supersedeas, and hereby tenders a bond for two thousand dollars as security for costs in the cause
99 with Thomas P. Branch, C. H. Phinizy, and James G. Bailey as bondsmen, which he prays may be approved; or, if decreed insufficient, that your honor will indicate what will be a sufficient security, and give your petitioner time to comply with the requirement. The usual justification of the bondsmen and citation is also herewith presented, with the request that your honor will sign the latter and grant the usual order allowing the appeal. Petitioner further shews that the

decree from which he desires to appeal was rendered on the seventh day of December, 1878. And petitioner will ever pray, &c.

W. W. MONTGOMERY,
Sol'r for Pet'r.

Order.

Upon the petition of George A. Cunningham, complainant in the above-stated cause, praying the allowance of an appeal to the Supreme Court of the United States in said cause, and tendering a bond for costs in the sum of two thousand dollars, with Thomas P. Branch, C. H. Phinizy, and James G. Bailey as bondsmen, which bond is hereby
100 approved; and it appearing that *that* the amount of complainant's interest involved in said suit exceeds the sum of five thousand dollars, it is ordered that an appeal be allowed, and that the clerk of the United States circuit court for the southern district of Georgia send up to the October term, 1879, of the Supreme Court of the United States the record of said cause, certified as required by law.

July 16, A. D. 1879.

W. B. WOODS,
U. S. Judge.

And afterwards, to wit, on the 25th day of August, A. D. 1879, the following proceeding' were had, to wit:

Bond for costs on appeal.

Know all men by these presents that we, Thomas P. Branch and Charles H. Phinizy and James G. Bailie, of the city of Augusta and State of Georgia, are held and firmly bound unto the Macon and Brunswick Railroad Company, a corporation created by the laws of the State of Georgia, Edward A. Flewellen, W. A. Lofton & George S. Jones, three last styling themselves "directors of the Macon & Brunswick Railroad," J. W. Renfroe, treasurer of Georgia, Alfred H.
101 Colquitt, governor of the State of Georgia, the First National Bank of Macon, a corporation created under the laws of the United States, and located at and transacting its business in the city of Macon, Georgia, and John H. James, all of the State of Georgia, in the sum of two thousand dollars, to be paid to said obligees, their successors, administrators, executors, or assignees (as the case may require); to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents; sealed with our seals; dated this fifteenth day of July, 1879.

Whereas George A. Cunningham, the complainant in the foregoing cause, hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the fifth circuit court of the United States for the southern district of Georgia:

Now, therefore, the condition of this obligation is such that if the above-named George A. Cunningham shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full
102 force and virtue.

T. P. BRANCH. [L. S.]
C. H. PHINIZY. [L. S.]
JAMES G. BAILIE. [L. S.]

Sealed and delivered in presence of—

HENRY W. CARR,
U. S. Commissioner, Southern Dist. of Georgia.

SOUTHERN DISTRICT OF GEORGIA,
City of Augusta:

Thomas P. Branch, Charles H. Phinizy, and James G. Bailie, obligors to the foregoing bond, depose and say, under oath, each for himself, that he is a freeholder, residing in said district, and that he is worth the sum of two thousand dollars over and above all his just debts and liabilities and the amount exempted from levy and sale by the laws of Georgia.

T. P. BRANCH.
C. H. PHINIZY.
JAMES G. BAILIE.

Sworn to and subscribed before me this fifteenth day of July, A. D. 1879.

HENRY W. CARR, [SEAL.]
U. S. Commissioner.

Bond approved July 16, 1879.

W. B. WOODS,
U. S. Judge.

103 And afterwards, to wit, on the 25th day of August, A. D. 1879, the following proceedings were had, to wit:

Petition for appeal to Supreme Court, &c.

To the honorable the Supreme Court of the United States:

The appeal of George A. Cunningham, the above-named complainant and appellant, respectfully showeth that upon the day of 1878, the above-named complainant filed his bill in the circuit court of the United States for the southern district of Georgia against the above-named The Macon and Brunswick Railroad Company, and against Edward A. Flewellen, W. A. Lofton, and George S. Jones, styling themselves "Directors of the Macon and Brunswick Railroad;" J. W. Renfroe, treasurer of the State of Georgia; Alfred H. Colquitt, governor of the State of Georgia; The First National Bank of Macon, and John H. James, defendants and appellees, praying for the foreclosure of a statutory mortgage on the Macon and Brunswick Railroad in favor of said complainant, as a bondholder of said railroad company, and
104 other *bondholder of said railroad company and other* bondholders, and upon other property owned by said road; and alleging that complainant and his co-bondholders were second mortgage bondholders, that their bonds had been endorsed by the State, that the company had failed to pay the accruing interest on the bonds, and that by the terms of the contract the principal had thereby become due; that by the terms of the statutory mortgage the State was made trustee for the bondholders with power to sell the property covered by the mortgage upon default in payment of the coupons on the bonds; that in alleged pursuance of such power the governor of Georgia *hold* sold said property and bid it in *it in* for the State of Georgia, and applied the proceeds to the payment of the first mortgage bonds, or rather had kept the road as the property of the State, paying the first mortgage bonds (upon which the State was also endorser) out of the general funds of the State, and repudiating the claims of the second mortgage bondholders; that complainant for himself, and such of
105 his co-obligees as choose to join in the suit, elected to repudiate the sale made by their trustee, at which the trustee had bought the property exposed to sale, and prayed that the sale

be decreed void; that part of the property so sold had passed into the hands of the First National Bank of Macon; that the defendants, Flewellen, Lofton & Jones, styling themselves "Directors of the Macon and Brunswick Railroad," were now in possession of the road and operating it; that J. W. Renfroe was in possession of part of the property on which complainant & his co-obligees had a lien under said mortgage superior to all others; that said Colquitt was in possession of certain deeds made by the governor to the State purporting to convey said railroad & other mortgaged property to the State of Georgia under said sale, and praying that said deeds be cancelled, and that John H. James, with others unknown to complainant, was a holder of bonds of the State which had been exchanged for the first-mortgage bonds of the Macon & Brunswick Railroad, and praying that if the statutory mortgage should be held to be a mortgage of indemnity to the
106 State that then Renfroe be enjoined from paying the whole of the money appropriated by the State to the payment of said State bonds so exchanged as aforesaid, and that he be decreed to divide it pro rata among all the holders of the bonds of said company endorsed by the State; that complainant owned more than $5,000 in value of said bonds. To which bill defendants demurred upon the ground that it was in effect a suit against the State of Georgia. The court sustained the demurrer, and dismissed the bill on the seventh of day of December, 1878.

Wherefore this appellant appeals from the whole of said decree of said circuit court, and respectfully prays that the decree of said circuit court, and the bill, demurrer, and other proceedings in the cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the cause anew, and that the decree of the circuit court and every part thereof, may be reversed, and a decree made reinstalling said cause, and overruling said demurrer, with costs, or such other decree as to the Supreme Court shall seem just.

Dated July 26th, A. D. 1879.

107 W. W. MONTGOMERY,
Solicitor for Appellant.
A. G. MAGRATH,
Of Counsel..

GEORGE A. CUNNINGHAM
vs.
THE MACON AND BRUNSWICK RAILROAD et al.
} Bill for discovery, relief, &c.

SOUTHERN DISTRICT OF GEORGIA:

, being sworn, saith that on the 22nd day of August, 1879, he served on each of the appellees in the above-stated case herein named, to wit, The Macon & Brunswick Railroad Company, Edward A. Flewellen, W. A. Lofton, George S. Jones, J. W. Renfroe, Alfred H. Colquitt, The First National Bank of Macon, and John H. James, a copy of the foregoing appeal filed in this cause with the clerk of the circuit court in & for the southern district of Georgia, by leaving said copies in the clerk's office of the circuit court aforesaid for said appellees.

J. R. SAUSSY.

Sworn to this 22nd day of August, A. D. 1879, before me.
WM. M. HEYWARD,
Dep. Clerk U. S. C. C.

108 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Southern District of Georgia, ss:

I, Willard P. Ward, clerk of the fifth circuit court of the United States for the southern district of Georgia, do hereby certify that the writings annexed to this certificate are true copies of their respective originals, and that I have compared the same and they are true transcripts therefrom now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the suit of George A. Cunningham, complainant, and The Macon and Brunswick Railroad Company et al., defendants, lately pending in said circuit court and appealed by the complainant, the said George A. Cunningham, to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court at Savannah, in said district, this 3d day of October, A. D. 1879, and of the Independence of the United States the 104th.

[SEAL.] WILLARD P. WARD, *Clerk.*

109 *Citation.*

By the honorable William B. Woods, one of the judges of the circuit court of the United States for the southern district of Georgia, to the Macon and Brunswick Railroad Company, a corporation created by the laws of Georgia; Edward A. Flewellen, W. A. Lofton, and George S. Jones, the last three styling themselves "Directors of the Macon and Brunswick Railroad;" J. W. Renfroe, treasurer of the State of Georgia; Alfred H. Colquitt, governor of the State of Georgia; the First National Bank of Macon, and John H. James:

Whereas George A. Cunningham has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of Georgia, made in your favor, the said The Macon and Brunswick Railroad Company, Edward A. Flewellen, W. A. Lofton, and George S. Jones, "Directors of the Macon and Brunswick Railroad Company"; J. W. Renfroe, treasurer of the State of Georgia, Alfred H. Colquitt, governor of the
110 State of Georgia, the First National Bank of Macon, and John H. James, and has filed the security required by law; you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Atlanta, in the northern district of Georgia, in the fifth circuit, the 16th day of July, in the year of our Lord eighteen hundred and seventy-nine.

W. B. WOODS,
U. S. Judge.

Service.

Service of the foregoing citation acknowledge' and further service waived.

This July , 1879.

GEO. H. HAZLEHURST,
President of the Macon & Brunswick R. R. Co.

Copy of the within citation acknowledged and accepted as service, and further service waived.

This 16th day of July, A. D. 1879.

111 ROBT. N. ELY,
Att'y Gen'l of Ga., Counsel for the Governor, the Treasurer, & the Directors M. & B. R. R.
J. W. JAMES.

I certify that on the 2nd day of August, 1879, at Macon, Ga., in my district, I personally served the within summons on the within-named First National Bank of Macon, by showing to W. W. Wrigley, cashier, the same with the seal of the court, then at same time delivering to him a copy thereof.

Macon, Ga., Aug'st 2nd, 1879.

O. P. FITZSIMMONS,
U. S. Marshall.
By B. D. LUMSDEN,
Deputy U. S. Marshall.

$14.30.

Filed Aug. 25th, A. D. 1879.

WM. M. HEYWARD,
Deputy Clerk.

Assignment of error.

Supreme Court of the United States.

GEORGE A. CUNNINGHAM
vs.
MACON & BRUNSWICK RAILROAD COMPANY et al.

112 Afterwards to wit, on the second Monday of October in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said George A. Cunningham, by A. G. McGrath and W. W. Montgomery, his solicitors, and says that in the record and proceedings aforesaid, there is manifest error in this, to wit, that by the record aforesaid it appears that the decree aforesaid, sustaining said demurrer and dismissing said bill as to the defendants Alfred H. Colquitt, Edward A. Flewellen, William A. Lofton, and George S. Jones, is founded upon the ground set up in the demurrer that the suit is in effect one against the State of Georgia, and that therefore the court has no jurisdiction of the case; whereas complainant insists that the suit is not against the State of Georgia, but against the defendants named in the bill, in their individual character, and that therefore the court has jurisdiction over both the parties and the subject-matter; and the said George A. Cunningham prays that the said decree dismissing the bill as to the de-
113 fendants named in the decree may be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said decree.

A. G. McGRATH,
W. W. MONTGOMERY,
Compl't's Sol'rs.

(Indorsement on cover:) No. 80. George A. Cunningham, appellant, vs. The Macon and Brunswick Railroad Company et al. S. Georgia, C. C. U. S. Filed 16th October, 1879.

109-426

FILED
OCT 23 1882
JAMES McKENNEY, CLK.

IN THE SUPREME COURT.

George A. Cunningham, Appellant,

vs.

The Macon and Brunswick Railroad Company, et al., Appellee.

BRIEF OF A. G. MAGRATH, FOR APPELLEE.

A clear perception of the relations of the several parties in this case to its subject-matter, with the principles in a Court of Equity which determine the nature and obligations of those relations, relieves this case of the objection as to parties, which only has presented the relief asked by the Complainant.

The facts of the case are thus briefly stated:

First. That The Macon and Brunswick Railroad Company issued to the amount of $600,000 its bonds, payable to bearer, negotiable by delivery: and that the Plaintiff in this case is the holder and owner, *bona fide* and for value.

Second. That these bonds did have endorsed the guaranty of the State of Georgia: and the payments were farther secured by a Statutory Mortgage of the property of The Macon and Brunswick Railroad Company.

Third. That prior to the issue of the bonds of the class of which the Plaintiff's bonds are a part, The Macon and Brunswick Railroad Company had issued bonds to the amount of $1,950;000, on which the guaranty of the State of Georgia was endorsed, and the payment of these bonds was farther secured by a Statutory Mortgage of the property of The Macon and Brunswick Railroad Company.

Fourth. That subsequently to the issue of the $600,000 bonds, the State of Georgia re-affirmed its guaranty of these bonds.

Fifth. That after this re-affirmation the Appellant purchased the bonds in this case.

Sixth. That after his purchase, the State of Georgia cancelled its guaranty; and proceeded to sell the property set forth in the Statutory Mortgage, in disregard of the rights of the Appellant.

II

The legal operation and effect of this Statutory Mortgage admits of no doubt. It is to be construed as if it were a mortgage of the property included in it, made directly by The Macon and Brunswick Railroad Company to secure certain creditors, and for that purpose given to a trustee, (the State of Georgia) to hold the same to secure the pay-

ment of these bonds. The terms of the Act of the Legislature of the State of Georgia defined the powers of that trustee: while the recognized principles of law which govern the conduct of a trustee in regard to his *cestui que* trusts are in all respects as applicable as if they were specially set forth in the Act; and the trustee were a private person. *Wilson vs. Boyce, 92 U. S. Rep., 320; Hand vs. Sav. and Ch. R. R. Co., 12 So. Ca. R., 314; Swasey vs. N. C. R. Co., 1 Hughes, 17.*

This resting upon the recognized rule, that when the capacity of a State to make a contract is admitted, the obligation of that State to perform what the contract requires, is as perfect as it would be in the case of a private person. The sovereignty of the State *quoad hoc*, ceases to have its proper and peculiar attributes. *Briscoe vs. Bank, 11 Pet., 324; U. S. Bank vs. Planters Bank, 9 Wheat., 904; Woodruff vs. Trapnall, 10 How., 206, and Furman vs. Nichol, 8 Wall, 44.*

Two important considerations then arise: First, That if with such obligations on it, the State, as such, cannot be sued, the Court will nevertheless enforce its proper duty, by proceeding against such private persons, amenable to process, as having possession of property or otherwise power to act, may be coerced into doing that which the State ought to do. Second, That where the contract into which the State has entered, is in the nature of a trust, and its duties those of a trustee, the cardinal rule will be enforced, that a trust will never be allowed to fail or fall for the want of a trustee. *Davis vs. Gray, 16 Wall, 203.*

With this statement we have plainly before us, the creditors; the security given to them; and the principle that where two parties are entitled to the benefit of a common security, the party having a prior right to be satisfied from it,

cannot obtain that satisfaction in a manner which would destroy all benefit from it to a junior creditor.

Was then the sale of the property of The Macon and Brunswick Railroad Company, by the State of Georgia, as a trustee of the property for the security of the bond creditors, fair and just to the bond creditors excluded by it from all benefit of the mortgage to secure their debt?

The property *in specie* is in the hands of certain persons, amenable to the process of this Court, holding it for the purchaser, as agent for that purchaser—that purchaser being the trustee.

That property capable of being identified, in whosesoever hands it may come, with notice of the trust, is and will remain subject to the jurisdiction of the Court, is a familiar rule in the Courts. *Frith vs. Cartland, L. R. Ch. Div. 13, p. 719; Parmlee vs. Duffell, 4 D. M. & G., p. 372; Knatchbull vs. Hallet, L. R. Ch. Div. 13, p. 696.*

And how far the rule is enforced is seen in the deposit of money. *Knatchbull vs. Hallet.*

And in this case where the trustee and purchaser are one,

and the property subject to the trust is in the possession of one amenable to the process of the Court, all of the requisites concur to enable the Court to give relief if there has been a breach of the trust. And the breach is thus alleged.

(*First.*) The trustee became the purchaser, at his own sale; and the sale was made on the terms he proposed, and were in disregard of the rights of the Appellant.

(*Second.*) If besides being trustee, the purchaser was also a surety, the duty of the trustee could not be relieved, because of a desire to protect his liability as surety. *R. R. Co. vs. Durant, 95 U. S. Rep., 576; Lewin on Trusts, Ch. 16, p. 362; Hamilton vs. Wright, 9 Cl. & F. III; Tennant vs. Trenchard, L. R. 4 Ch., 537; Drury vs. Cross, 7 Wall, 299.*

(*Third.*) The time, the terms of sale, all were such that they would not have been allowed by the Court.

(*Fourth.*) Combining the positions of a trustee and a surety, it was proper that the mortgage should have been foreclosed, with all of the safeguards that a Court would provide. The power of sale in the mortgage did not oust the jurisdiction of Chancery. *Jones on Mortgages, Sec. 177; Id. R. R. Securities, Sec. 299.*

(*Fifth.*) It is such a foreclosure that the Plaintiff asked, and now asks. *Jones on Mortgages, Sec. 177; Id. R. R. Securities, Sec. 399.*

As to the first. No rule is more perfectly admitted: no

rule in its application more enforced: than that one who is in a fiduciary capacity, cannot do an act which is not consistent with the highest regard for the interests he has undertaken to protect.

In this case there is the clearest proof of an utter disregard of the rights and interests of the class of bondholders represented by the Appellant in this case.

As to the second. That one could relieve himself from the fullest measure of duty as a trustee by being also a creditor, cannot be maintained. The fact that there was a temptation in the case, instead of excusing or relieving, would call for a more jealous inspection of conduct. *Wormley vs. Wormley, 8 Wheat., 421.*

As to the third. The parties who acted for the State of Georgia, by their own admission as to the time, and the terms of sale, exclude the idea of the sale being fairly made for the protection of all parties interested in the mortgage.

As to the fourth. If the three specifications which allege breaches of duty, shall be commended to the Court, what conduct under such, the circumstances of this case, could be more consistent with the duty of the trustee, than with all parties before the Court, to have the sale made

by the Court, under such terms, at such time, and in such modes of payment as it would direct.

And as to the fifth. It would follow as the proper consequence of the four now stated.

But it will not be irrelevant to bring some matters of interest to the notice of the Court.

The record will show that a mortgage professing to be in execution of the Statutory Lien was executed on the 22d July, 1870: and in that mortgage the transfer is made to Rufus B. Bullock, Governor of the State of Georgia. The *habendum* is to him and his successors in office. In consequence of which James M. Smith, as Governor, became the holder of the Mortgage Deed, with the power to seize and take possession of the mortgaged property, if default is made by the Company: and to sell the same, "in such manner, and at such time, as in his judgment may best subserve the interests of all concerned."

The Governor has himself said that the time of sale was not favorable. The terms certainly were not.

And the property was knocked off to the State of Georgia: it having become, through its Governor, the highest bidder for the same.

We are left to conjecture as to the purpose which prompted the making of this mortgage. On its face it simply expresses the desire "of confirming the said lien created by the aforesaid Act in favor of holders of said bonds so endorsed as aforesaid."

Whether this mortgage was cumulative to the Statutory Mortgage, or was the substitute for it, is not a matter now necessary to be discussed.

The position of the Plaintiff appeals strongly to a Court of Justice for protection. A public Act of the Legislature of the State of Georgia declares that the guaranty of the State is given to certain bonds: and a mortgage is made by the corporation to secure these bonds. The bonds so guaranteed are issued. Two years after the issue, the Legislature of the State of Georgia re-affirmed the endorsement of its guaranty. With this renewed assurance the Plaintiff purchased the bonds he now holds. After the Plaintiff had thus become the holder and owner of these bonds, the State of Georgia dis-affirmed the obligation of its guaranty; and to all intents and purpose with that denied the Plaintiff any right to the protection of the Statutory Mortgage. The possession of the property is taken, and a sale is made of it, not only with an exclusive reference to the first-class of guaranteed bonds: but that exclusive reference involving the denial and sacrifice of the rights of the Plaintiff.

That which the Plaintiff asks is that he shall not be prevented from that investigation of the facts, which being presented to the Court, would entitle him to relief, because the objection is made that the wrongful act complained of has been done by the State: when the subject-matter out of which the wrongful act grew is not in the actual possession of the State, but in the hands of those who are amenable to the process of the Court.

In *Davis vs. Gray, 16 Wall., 203*, this Court has said, "where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the Court may proceed against the officers of the State in all respects as if the State were a party to the record."

A. G. Magrath

Solicitor

109-446

OFFICE SUPREME COURT U.S.
FILED
NOV 6 1882
JAMES H. McKENNEY, Clerk

NO. 80.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882

GEORGE A. CUNNINGHAM, Appellant,

vs.

THE MACON & BRUNSWICK RAILROAD CO., *et al.*, Appellees,

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

BRIEF FOR APPELLANTS.

W. W. MONTGOMERY.

The position of the Plaintiff appeals strongly to a Court of Justice for protection. A public Act of the Legislature of the State of Georgia declares that the guaranty of the State is given to certain bonds: and a mortgage is made by the corporation to secure these bonds. The bonds so guaranteed are issued. Two years after the issue, the Legislature of the State of Georgia re-affirmed the endorsement of its guaranty. With this renewed assurance the Plaintiff purchased the bonds he now holds. After the Plaintiff had thus become the holder and owner of these bonds, the State of Georgia dis-affirmed the obligation of its guaranty; and to all intents and purpose with that denied the Plaintiff any right to the protection of the Statutory Mortgage. The possession of the property is taken, and a sale is made of it, not only with an exclusive reference to the first-class of guaranteed bonds: but that exclusive reference involving the denial and sacrifice of the rights of the Plaintiff.

That which the Plaintiff asks is that he shall not be prevented from that investigation of the facts, which being presented to the Court, would entitle him to relief, because the objection is made that the wrongful act complained of has been done by the State: when the subject-matter out of which the wrongful act grew is not in the actual possession of the State, but in the hands of those who are amenable to the process of the Court.

In *Davis vs. Gray, 16 Wall., 203*, this Court has said, "where the State is concerned, the State should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the Court may proceed against the officers of the State in all respects as if the State were a party to the record."

A. G. Magrath

for Plaintiff

109-446

FILED
NOV 6 1882

NO. 80.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1882

GEORGE A. CUNNINGHAM, Appellant,

vs.

THE MACON & BRUNSWICK RAILROAD CO., *et al.*, Appellees.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

BRIEF FOR APPELLANTS.

W. W. MONTGOMERY.

STATEMENT.

On December 3rd, 1866, the Legislature of Georgia passed an Act authorizing the Governor to endorse the bonds of the Macon & Brunswick Railroad Company to the extent of $10,000 per mile, and on the next day, December 4th, passed a series of resolutions annexing certain conditions to said endorsement. Under the authority thus given, bonds, to the amount of $1,950,000, were issued by the Company and endorsed by the Governor, and subsequently negotiated. By the terms of the Act, the State's endorsement operated as a mortgage, superior to all other liens; whether as an indemnity to the State only to save her harmless from liability incurred by the endorsement, or as a direct mortgage to the bondholders, with the State as their trustee, is one of the questions in the case.

On June 22d, 1870, the Railroad Company executed a written mortgage to the Governor for the purpose "of confirming the lien created by the aforesaid Act in favor of the holders of said bonds, so endorsed as aforesaid." Record, p. 10.

This mortgage was accepted by the Governor and duly recorded.

On October 27th, 1870, said Act of December 3rd, 1866, was amended so as to authorize the Governor to endorse the bonds of said Company to the extent of $3,000 per mile, in addition to the endorsement of $10,000 per mile authorized by the original Act.

Before the Act of October 27th, 1870, but after that of 1866, the Company had issued a second class of bonds to the amount of $1,100,000, secured by a second mortgage on the road. The trustees of this second mortgage, with consent of their bondholders, released, or rather postponed, their lien in favor of the bonds of said Company, to the amount of $600,000, to be issued by the Company, and endorsed by the State, under the Act of October 27th, 1870. This release, or postponement (exhibit B, of the bill, Record, p. 13) was accepted by the Governor, and deposited by him in the Executive Department, at Atlanta. It is dated November 1st, 1870. After the execution of said release, and its acceptance by the Governor, the $600,000 series of bonds, authorized by the Act of December 3rd, 1866, as amended by that of October 27th, 1870, was issued by the Company, endorsed by the Governor, and negotiated and passed into the hands of *bona fide* holders.

During the session of 1872 of the Legislature, that body appointed a committee to investigate the validity of the State's endorsement upon the bonds of the M. & B. R. R., (among other bonds endorsed by the State,) and after such investigation, to-wit: On August 14th, 1872, passed the resolution appearing on page 2 of the Record, confirming the State's endorsement of both series of the bonds of the M. & B. R. R.

After the passage of this resolution, and before any further action by the State on the subject, Appellant bought the bonds sued on, the same being a part of the $600,000 series.

On July 1st, 1873, and November 1st, 1873, the Company failed, and has since continuously failed to pay the interest on all of its bonds. On July 2d, 1873, the Governor seized the road, under the power vested in him by the Act of 1866, including certain property transferred to one L. N. Whittle and another as trustees, by a deed of trust dated June 30th, 1873, for the purpose of securing the payment of certain fare bills issued by said Company (or seized so much of said property as remained undis-

posed of after executing the trust), amounting to $44,500, as valued in said deed of trust to Whittle, *et al.*

Said property, so transferred to Whittle, was acquired by said Company after the issue of the $1,950,000 series of bonds, but before the issue of the $600,000 series, and was in no way appurtenant to the road. Record, p. 18, &c.

On March 6th, 1875, the Legislature passed resolutions declaring the endorsement of the State on the $600,000 series of bonds "unconstitutional, null and void"; re-affirming the validity of the endorsement on the $1,950,000 series, and authorizing the Governor to sell the road, with its franchises, &c., for money, or bonds, of the $1,950,000 series, as in his judgment might be consistent with the interest of the State.

It will be perceived that no repudiation of the State's endorsement of the $600,000 series took place until nearly two years after the failure of the Company and the seizure of the road by the Governor in the interest of the holders of *both* series of endorsed bonds. The trust was not repudiated (if the statutory mortgage was a trust in favor of the bondholders), until the trustee had obtained possession of the mortgaged property; upon doing which she repudiated, at once, the trust, and her endorsement, leaving the holders of the repudiated bonds remediless, whether as against the endorser, or as against the property conveyed, in trust, for the payment of the bonds, unless the present suit can be maintained.

The Governor seized the road, as stated, and appointed Flewellen, one of the defendants, Receiver, to take possession of the road, and other property, and sell the same.

Flewellen, under orders from the Governor, advertised all the property for sale, on the first Tuesday in June, 1875, "for cash, for the bonds of the State, or the first mortgage bonds of the Company, endorsed in behalf of the State, under the authority of the Act, approved December 3rd, 1866." Record, p. 4.

The Governor in his order directing the sale uses the same language (Record, p. 4,) but on the day of sale caused it to be announced that said first mortgage bonds would only be received at their then market value, which was much below par. Flewellen notified the Governor, in advance, of the sale, that the time selected was unfortunate, and the Governor expressed himself to the same effect, but nevertheless persisted in having the property sold. See Governor's letter—Record, p. 21.

The sale took place as advertised, and the property was bought by the Governor, and a deed made by him to the State. Record, p. 22. The price at which the whole property was bid off was $1,000,000. All the bonds of the $1,950,000 were taken up by the State prior to the filing of this bill, the State substituting her own bonds for them. Since the seizure of the road the Company has been hopelessly insolvent.

Three thousand dollars of the $1,950,000 series, and 440 shares of the Southern & Atlantic Telegraph Co., of N. Y., held by Whittle under the trust deed to him, were transferred by him to Renfroe, one of the defendants, as Treasurer of the State. Record, p. 5. $76,340.20 of the coupons of the $1,950,000 were exchanged by the holders thereof with the Company for the same amount of the $600,000 series of bonds. Record, p. 5.

The bill insists that the property held by Whittle and not necessary to pay the fare bills for which payment it was mortgaged, is subject to the lien of the $600,000 series, whether the other property is or not, and that as to the amount of $76,340.20 of that series received as coupons of the first series, they stand upon the same footing as the $1,950,000 series, and certainly to that extent constitute a first lien upon the road.

The railroad seized by the Governor and sold, is alleged to be in the hands of Flewellen, Lofton and Jones (all defendants to the bill), styling themselves "Directors of the Macon and Brunswick Railroad." Record, page 6.

The bill is filed for the purpose, among other things, of foreclosing said mortgage in favor of the payment of the $600,000 series of endorsed bonds, upon the assumption that said mortgage is to the Governor as trustee for the bondholders. But if (the bill goes on to claim in the alternative) the mortgage is one of indemnity only to the State, then the bill insists that all amounts paid by the State should be apportioned pro rata among all the holders of both series of endorsed bonds, and in as much as the State took up the $1,950,000 by substituting her own bonds for them, that every time an appropriation is made by the Legislature to pay the interest on the $1,950,000 of her own bonds, so substituted, the Treasurer should be compelled to apply the appropriation to the payment of the interest on both series pro rata, and the $1,950,000 of the State bonds substituted for the first series of the Company should be treated as proceeds of the sale of the road (if the sale be held valid), and the holders of said bonds compelled, when discovered, to become parties, and be made to surrender the pro rata of said proceeds of sale to the holders of the $600,000 series—for this purpose one of the holders of the State bonds so substituted, as aforesaid, for the $1,950,000 series, is made a party, and leave asked to make others so when discovered.

The following are the Acts referred to in the foregoing statement :

An Act to extend the aid of the State to the completion of the Macon & Brunswick Railroad, and for other purposes.

WHEREAS, The Macon & Brunswick Railroad has been completed to the distance of fifty miles from the city of Macon, and is thoroughly equipped, and daily trains are running thereon, and seventy miles additional are graded and ready for superstructure; *and whereas*, its completion to Brunswick, would greatly inure to the benefit of the State in developing its agricultural, commercial and manufacturing interests; *and whereas*, by reason of the financial embarrassments resulting from the late war, the stockholders of said railroad are unable to supply the capital necessary to the completion of this great work.

SECTION 1. *Be it enacted, etc.*, That his Excellency, the Governor, be, and he is hereby authorized to place the endorsement of the State on the bonds of the Macon & Brunswick Railroad Company, which said company may issue, to the amount of ten thousand dollars per mile for as many miles of said road as are now completed, and the like amount per mile for every additional ten miles, as the same may be completed and placed in running order, on the following terms and conditions, to-wit: Before any such endorsement shall be made the Governor shall be satisfied that as much of the road as the said endorsement shall be applied for is really finished and in complete running order, and that said road is free from all liens, or mortgages, or other incumbrances, which may in any manner endanger the security of the State; and upon the further condition and express understanding that any endorsement of said bonds, when thus made, *shall not only vest the title to all property of every kind which may be purchased with said bonds in the State*, until all the bonds so endorsed shall be paid; but the said endorsement shall be, and is hereby understood *to operate as a prior lien or mortgage on all the property of the Company*, to be enforced as hereinafter provided for.

SETION II. In the event of any bond or bonds endorsed by the State, as provided in the first section of this act, or the interest due thereon, shall not be paid by said railroad company at maturity, or when due, it shall be the duty of the Governor, upon information of such default by any holder of said bond or bonds, to seize and take possession of all the property of said railroad company, *and apply the earnings of said road to the extinguishment of said bond or bonds, or coupons,* and shall sell the said road and its equipments, and other property belonging to said company in such a manner and at such time *as in his judgment may best subserve the interest of all concerned.*

SECTION III. Repeals conflicting laws.

Approved 3d of December, 1866.

Resolutions supplemental to above Act.

WHEREAS, a bill has been passed at this session of the General Assembly entitled an act to extend the aid of the State to the completion of the Macon & Brunswick Railroad, and for other purposes; *and whereas,* said bill authorizes his Excellency, the Governor, to place the endorsement of the State on the bonds of the company; *and whereas,* no limitations were fixed upon the terms of sale of said bonds. Therefore, be it

1st. *Resolved,* That said company shall not sell or dispose of the bonds thus endorsed by his Excellency for more than ten per cent. discount, and the endorsement of the State upon the bonds of the said company shall not exceed one million of dollars, until an amount of capital equal to the additional endorsement shall be *bona fide* subscribed and paid into said company.

2d. *Be it further Resolved,* That in order more fully to secure the payment of the bonds of said railroad company, it shall be the duty of said company to set apart annually two per cent. of the amount endorsed for, as a sinking fund, which shall be invested in State bonds and deposited with the Governor, to be held in trust for said company, and which shall be applied exclusively to the payment of the bonds of said company.

3d. *Be it further Resolved,* That his Excellency, the Governor, be authorized to withhold his endorsement upon the bonds of said company until the President and Directors of said company give him written acceptance of the terms of these resolutions, and that these resolutions are received as explanatory of the bill extending the aid of the State to said Macon & Brunswick Railroad Company, and equally binding with said act.

Approved 4th December, 1866.

An Act to amend an Act to extend the aid of the State to the completion of the Macon & Brunswick Railroad, and for other purposes.

WHEREAS, The Macon & Brunswick Railroad has been completed to Brunswick, requiring a greater outlay of money than was originally contemplated, to place the same in complete running order, and to furnish the necessary cars, engines and machinery; *and whereas,* the State has, by recent legislation, endorsed the bonds of other railroads to the extent of fifteen thousand dollars per mile—

SECTION 1. *The General Assembly of the State of Georgia do enact,* That the above recited act be so amended as to authorize the Governor to place the endorsement of the State, to the extent of three thousand dollars per mile, upon the bonds of said Macon & Brunswick Railroad Company, in

addition to ten thousand dollars, as recited in the act of which this is amendatory.

SECTION 2. *Be it further enacted,* That all laws and parts of laws in conflict with this act be, and the same is hereby repealed.

Approved October 24, 1870.

A resolution in reference to the State's guaranty on the bonds of the Macon & Brunswick Railroad Company.

Resolved by the Senate and House of Representatives in General Assembly met, and it is hereby resolved by authority of the same, That the State's guaranty placed on the bonds of the Macon and Brunswick Railroad Company is binding on the State.

Approved August 14, 1872.

Resolved, by the General Assembly of the State of Georgia, That the State's endorsement upon the first mortgage bonds of the Macon & Brunswick Railroad, to the amount of one million nine hundred and fifty thousand dollars ($1,950,000,) issued under an act approved the third day of December, 1866, is valid and binding upon the State, and the State's liability thereto is hereby recognized and affirmed.

Resolved further, That the State's endorsement upon the bonds of the Macon & Brunswick Railroad, issued under an act approved October 24th, 1870, be, and the same is hereby, declared unconstitutional, null and void.

Resolved further, That it is the sense of this General Assembly that the Macon & Brunswick Railroad, with its franchises, equipments and appurtenances be sold by the Governor at an early date, and if found to be practicable, as early as the first day of June, 1875, at public or private sale, and upon such terms, and for such price, in money, or first mortgage endorsed bonds of the Macon & Brunswick Railroad, or bonds of the State, as in his judgment may be consistent with the interest of the State: *Provided,* that no commissions or per centage shall be authorized or allowed in said sales.

Approved March 6, 1875.

It is proper I should explain my action in approving these resolutions. A careful examination of the evidence found in the records of the Macon & Brunswick Railroad Company, and in the reports of the Investigating Committees of the Legislature, has satisfied my mind that there was great irregularity in the issuing of the last $950,000 of the State's endorsement on the company's bonds, under the act approved December 3, 1865. These endorsements were made in palpable violation of the conditions in the resolutions explanatory of said act, which provided that the endorsement of the State upon the bonds of the company should not exceed $1,000,000, until an amount of capital equal to the additional endorsement should be *bona fide* subscribed and paid into the company. It is very clear from the evidence, that there was no *bona fide* subscription and payment of capital into the company after the State's endorsement was placed upon the first $1,000,000 of the company's bonds. Neither was there, in my judgment, even an indirect compliance with this very important condition. The company, it seems however, expended large sums in payment of interest, lawyers' fees, etc., and it is sought to swell the amount of capital invested in the road by including such items. The amount of money invested in the company consists only in such sums as were expended for the right of way, for the purchase of material, and in payment for the

labor required to construct the road, and for equipment. The Legislature that granted aid to the company would hardly have considered $40,000 of lawyers' fees, or several hundred thousand dollars of interest upon the company's debts such "a *bona fide* subscription and payment of capital into the company," as would warrant the endorsement of the bonds by the State.

Insomuch, however, as the validity of these indorsements have, after investigation, been affirmed by two General Assemblies, to which affirmance I do not find any constitutional objection, and thinking it probable that these bonds have passed into the hands of persons not properly chargeable with notice of any irregularity in the indorsements thereon, I consider it my duty to acquiesce in the action of the General Assembly. With this explanation, the resolutions are approved.

[Signed] JAMES M. SMITH.

March 6, 1875.

The various defendants, agents of the State, filed sundry demurrers and pleas, which are summed up in the phrase, want of jurisdiction in the Court, as the proceeding was an indirect attempt to sue the State. The case was heard on the demurrers, and the bill dismissed as to the agents of the State.

It is no where alleged in the bill that Flewellen and others, styling themselves "Directors of the Macon and Brunswick Railroad," are in possession of the road as agents of the State. This fact is pleaded by them; the bill simply charging that they individually are in possession.

The Governor in his deed to the State (Record, p. 22), undertakes to convey the 440 shares of the telegraph stock, in a corporation in New York, which he claims to have seized—by what process does not appear. The three thousand dollars of bonds transferred by Whittle to Renfroe were not advertised nor sold, and are not named in said deed. Record, p. 5 and 22.

SUPREME COURT OF THE UNITED STATES.

GEORGE A. CUNNINGHAM,
vs.
THE MACON & BRUNSWICK RAILROAD COMPANY, *et al.*

Assignment of Error.

Afterwards, to-wit: On the second Monday of October, in this same term, before the Justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said George A. Cunningham, by A. G. McGrath and W. W. Montgomery, his solicitors, and says, that in the record and proceedings aforesaid, there is manifest error in this, to-wit: That by the record aforesaid, it appears that the decree aforesaid, sustaining said demurrer and dismissing said bill, as to the defendants, Alfred H. Colquitt, Edward A. Flewellen, William A. Lofton and George S. Jones, is founded upon the ground set up in the demurrer; that the suit is, in effect, one against the State of Georgia, and that, therefore, the Court has no jurisdiction in the case. Whereas, complainant insists that the suit is not against the State of Georgia, but against the defendants named in the bill, in their individual character; and that, therefore, the Court has jurisdiction over both, the parties and the subject-matter, and the said George A. Cunningham prays that the said decree, dismissing the bill as to the defendants named in the decree, may be reversed, annulled, and altogether held for nought, and that he may be restored to all things which he hath lost by occasion of the said decree.

A. G. McGRATH,
W. W. MONTGOMERY,
Complainants' Solicitors.

QUESTIONS INVOLVED.

I.

Is the statutory mortgage a lien in favor of the holders of the endorsed bonds, or is it only an indemnity to the State?

II.

If a lien in favor of the holders, can they now, in this proceeding, subject the road to the payment of their bonds? And this raises the questions: 1st. Were the proceedings instituted by the State for the sale of road, and its sale thereunder, valid? 2d. If not valid, can property unlawfully taken possession of by the State be subjected, in the hands of her agents, to the *bona fide* liens of creditors? 3d. If valid, can the holders of the repudiated endorsed bonds arrest the appropriations by the State for the payment of the interest on the State bonds, substituted for the $1,950,000 series, in the hands of the Treasurer, and thus compel the holders of such State bonds to discover themselves and litigate with complainant the right of the holders of the $600,000 series, to participate with them in the proceeds arising from the sale of the road by the State?

III

If the mortgage is one af indemnity to the State only, were the proceedings to foreclose valid, and if not, can the bondholders, as creditors of road, attack them and have the sale set aside, and insist on a re-sale?

IV.

In any event, was not the property embraced in the schedule annexed to Exhibit E of the bill, excepted from the mortgage, and are not the holders of the $600,000 series of bonds entitled, as prayed, to have this property placed in the hands of the Receiver asked for, to be sold by him, and the proceeds applied to the payment of their bonds?

V.

Is the endorsement of the $600,000 series of bonds "unconstitutional, null and void," as *resolved* by the Legislature?

I.

As to the first question, all parties recognized the statutory mortgage as one to the State as trustee for the bondholders. Exhibit A of the bill. Record, p. 10.

This mortgage is certainly one directly to the holders of the $600,000 series of bonds, if not to the holders of the $1,950,000 series. For the confirmatory mortgage recites that the bonds issued under the Act of 1866 were secured by "the lien created by the aforesaid Act in favor of holders of said bonds, so endorsed, as aforesaid"; and "for the purpose of confirming the aforesaid lien, and for the better securing the payment of the said sum of money mentioned in the condition of their said bonds or obligations, above referred to, and endorsed, as aforesaid, with interest thereon, according to the true intent and meaning thereof," &c., the said mortgage is given.

The date of the execution of this mortgage is June 22d, 1870. Record, p. 12.

The $600,000 series of bonds were issued *after* this interpretation of the Act, placed upon it by the Company in executing, and the State in accepting, this mortgage. Certainly the release of the second (and unendorsed) series of bonds, ($1,100,000), through their trustees, in favor of the holders of the $600,000 series, (Record, p. 13), bearing date Nov. 1st, 1870, same day with $600,000 series, gives a mortgage lien to the second series of endorsed bonds. This release was accepted by the Governor and filed in the Executive Department. Record, p. 14. So the recitals in Exhibit C, (one of the $1,950,000), show the interpretation put upon the Act by the parties.

All these contracts in which the State, through its officers, participated, show the intention of the parties in executing the $600,000 series.

Hence, the $600,000 series of bonds are controlled by that principle which says, that a contract will be held to have that meaning which one party knew the other placed upon it at the time of its execution, and in which the former silently acquiesced.

But it is submitted the statutory mortgage is, itself, a direct lien in favor of the bondholders.

Hand vs. Savannah & Charleston R. R.; 12 So. Ca. R. R., 314–330, *et seq.*

If the statutory lien did not exist in favor of the $1,950,000 series of bonds, but did exist, for the reasons stated, in behalf of the $600,000

series, then the security of the latter has, by an arbitrary act of the State, been taken from the mortgagees and applied to the payment of bonds having no lien upon the property. Can the obligation of a contract be thus not only impaired, but absolutely destroyed by State action? Is the Eleventh Amendment of the U. S. Constitution to override Art. I, §X. Art. III, §II, and the XIVth Amendment, in a case where a citizen of one State is attempting to assert a right of property against citizens of another State, because the latter set up an adverse claim in the character of agents of a State? It is no reply to say the State's mortgage of indemnity, (if the mortgage be such as to the $1,950,000), ranks the direct lien of the $600,000. The State, by her action as to the latter, would be estopped from asserting such priority if she were to submit her rights to the jurisdiction of the Court. As she does not submit them, the Court will not consider them. Certainly this is true, in a case where should they be considered, a superior equity would claim recognition at the hands of the Court.

But, it is claimed that if the mortgage is direct to the bondholders, the $1,950,000 series have the first lien, and the property did not sell for enough to pay these bonds.

The reply is, if the mortgage is direct, the State was the trustee, and could not buy at her own sale, if the beneficiaries elect to repudiate the purchase, and the bill, in behalf of one set of beneficiaries, does so elect. Again, the property embraced in the schedule annexed to Exhibit E, (Record, p. 18), is not covered by the mortgage, so far as the $1,950,000 series is concerned, but is so covered as to the $600,000. Nor was the sale made in accordance with the Act of 1866; but of that hereafter.

And again, the $1,950,000 series having been paid by the surety, the $600,000 series has now the first lien, unless the State come in and ask to be subrogated to the rights of the holders of the first series. She has not done this, and cannot do it, without submitting the question of the validity of her endorsement of the $600,000 series to the jurisdiction of the Court, so as to make the judgment binding on her.

II.

Assuming the mortgage to be one to the State, as trustee for the bondholders, can the latter subject the road, in the hands of the State's agents, to the payment of their bonds, notwithstanding the sale and purchase by the State.

We submit: 1st. That as to the $44,000 of property left over in the hands of Whittle, after payment of the fare bills, no mortgage existed in favor of the $1,950,000; and as to this property, the State's agents are mere tort-feasors and can be sued, the State having no power other than that of the strong hand, to possess itself of that property.

Where adverse title is set up by plaintiff, ejectment may be maintained against the agents of the government who are in possession.

Grinar vs. McDowell, 6 Wall., 263; Meigs vs. McLung's lessee, 9 Crouch, 11; Dreux vs. Kennedy, 12 Robinson, La., 489; Cooley vs. O'Connor, 12 Wall., 391; 41 Cal., 36.

And trover, Fryer vs. McRea, 8 Porter, (Ala.) 187; Osborne vs. Bank of the U. S., 9 Wheat, 735.

2d. As to the property covered by the mortgage:

The State, under the assumption, is trustee, and bought, at her own sale, as such. We, one set of beneficiaries, elect to repudiate the sale. We doing so, it is submitted that the agents of the State are in a position analogous to agents in possession of land, where ejectment is brought, and

the suit will be sustained. At most, the agents can only claim that the State holds the equity of redemption, and in such a case the suit can be maintained.

Elliott vs. Van Voorst, 3 Wallace, Jr., 301 : Swazey vs. N. C. R. R., 1 Hughes, 17.

When the *res* is already within the jurisdiction of the Court, and a citizen seeks to subject it to his claims, the suit is maintainable.

The Davis, 10 Wall., 20 ; The Siren, 7 Wall., 152.

When it is necessary to give the Court jurisdiction, to take the custody of the property out of the hands of the agent of the Government, into those of the Court, the suit will not be sustained.

Briggs vs. Light Boats, 11 Allen, 150.

In the case at Bar, the jurisdiction over the property and individuals, claiming to be State agents, already exists.

See Fifth Nat. Bank vs. Long in U. S Circuit Court, Northern District of Illinois ; United States vs. Wilder, 3 Sum., 308.

Again, the sale was not made in compliance with the law.

See Act of 1866 ; Exhibits F and G, of the bill ; Record, 21–22 ; Record, 3–4 : Act of 1875.

Even had the State been a mortgagee in her own interest alone, the sale must have been conducted in strict compliance with the power conferred.

Howard vs. Ames, 3 Met., 311 ; 1 Hilliard on Mortgages, (ed. 1872), 144, §22.

The seizure by the State, though originally legal, becomes tortious the moment she violates the conditions of the trust.

Cregg vs. Van Phul, 1 Wall., 274.

And hence is no defence to the parties in possession.

Doty vs. Hawkins, 6 N. H., 247.

In Georgia, the practice in ejectment is to sue the tenant in possession, and "let in the person behind," if he desires to come in and defend.

Redwine vs. Brown, 10 Ga., 315.

And so in trover.

Porter vs. Thomas, 23 Ga., 467.

And in foreclosing a mortgage, (which the present proceedings seek to do), it is not admissible to make any but the mortgagor a party defendant.

The Code of Georgia §§3962–3965, reads thus :

§3962. (3886.) *Foreclosure of mortgage on realty.* Mortgages on real estate in Georgia shall be foreclosed in the following manner, to-wit : Any person applying and entitled to foreclose such mortgage shall, by himself, or his attorney, petition to the Superior Court of the county wherein the mortgaged property may be, which petition shall contain a statement of the case, the amount of the petitioner's demand, and a description of the property mortgaged ; whereupon the Court shall grant a rule directing the principal, interests and costs to be paid into Court, on or before the first day of the next term immediately succeeding the one at which such rule is granted ; which rule shall be published once a month for four months, or served on the mortgager, or his special agent or attorney, at least three months previous to the time at which the money is directed to be paid into Court as aforesaid.

§3963. (3887.) *By representative of deceased mortgagee.* If the person entitled to foreclose the mortgage on real estate be dead, the application and proceeding to foreclose may be made and prosecuted by his executor or administrator.

§3964. (3888.) *Defense against foreclosure of mortgage on realty.* When a rule *nisi* to foreclose a mortgage on real estate has been granted, and the same has been published or served, as hereinbefore required, the mortgagor, or his special agent or attorney, may appear at the term of the Court at which the money is directed to be paid, and file his objections to the foreclosure of such mortgage, and may set up and avail himself of any defense which he might lawfully set up in an ordinary suit instituted on the debt or demand secured by such mortgage, and which goes to show that the applicant is not entitled to the foreclosure sought, or that the amount claimed is not due ; *Provided*, that the facts of such defense are verified by the affidavit of such mortgager, or special agent, or attorney, at the time of filing the same.

§3965. (3889.) *Third persons cannot defend.* If the mortgagor, or his special agent, or attorney, fail to set up the defense provided for in the preceding section, it is not competent for any third person to interpose ; neither will the Court itself, of its own motion, do so.

Hence, if the suit were in the State Courts, the State, though she waived her exemption from suit, could not be made a party defendant.

To make a judgment upon a mortgage good against particular persons, it is not necessary that they should be summoned. It is sufficient to bring suit against the tenant in possession. The security of a mortgage is a security *in rem.*

Shelton vs. Atkins, 22 Pick., 71.

If a State is a sole corporator of a Bank, its sovereignty does not protect the Bank from suit.

Briscoe vs. Bank of Commonwealth, 11 Pet, 324 ; Bank of Ky., vs. Wister, 2 Pet., 318, U. S. Bank vs. Planters' Bank of Ga, 9 Wheat, 904.

The 11th Amendment of the United States Constitution applies only where a State is *party to the record. Her interest in the suit* does not oust the jurisdiction. Her officers may be sued, if they, under authority of a void State law, injure plaintiff, and the State's interest will not abate the suit.

Osborne vs. U. S. Bank, 9 Wheat, 846. *et seq.*

A State may give a statutory mortgage of its property to secure its bonds, and the U. S. Courts have jurisdiction to foreclose the mortgage in favor of the bondholders, where the property is found in the hands of the State's agent without the State becoming a party to the suit.

Swasey vs. N. C. R. R. Co, 1 Hughes, 17; S. C., 71; N. C. R., 571.

This case seems difficult to reconcile with Branch vs. M. & B. R. R., 2 Woods. 385.

In this latter case complainant admitted the mortgage to be one of indemnity.

In Davis vs. Gray, 16 Wall, 203, Texas granted land to the M. & El P. R. R. The Company mortgaged the land to a trustee to secure its bonds, which not being paid the trustee filed a bill to enjoin the railroad from disposing of the land, under which a receiver was appointed. This in July, 1870. In November, 1869, the present Constitution of Texas, approved by Congress, forfeited this land to the State. The same Constitutional Convention passed an ordinance granting to all settlers upon said land 80 acres etc., and enacting that the vacant land within the grant is subject to sale to settlers. The Governor and Commissioner of Land Office proceeded to issue certificates and grants to settlers, etc.

The Receiver filed a bill against the Governor and Commissioner to enjoin such issuing, alleging insolvency of railroad, and that bonds could only be paid by sale of franchise, lands, etc.

The bill was demurred to on several grounds. Among them, that defendants had no "direct or personal interest in the lands which were the subject matters of this suit." (Record, p. 27, 28, 29.) It was also insisted that the suit was in effect against the State of Texas. But it was held that the suit was well brought, and the injunction was granted. The Constitution of Texas and the ordinance were held to impair the contract.

"Although the claims of a State may be ultimately affected by the decision of a cause, yet if the State be not necessarily a party defendant, the Courts of the U. S. are bound to exercise jurisdiction."

United States vs. Peters, 5 Cranch, 115; Dreux vs. Kennedy, 12 Robinson La., 489, was an ejectment against officers of the United States mint in possession, and defendants set up the same objection as now relied on in the case at bar, viz:

That the suit was an attempt to effect indirectly what could not be directly done, *i. e.*, sue the Government; but the Court held the action well brought.

In England the suit against the Crown is always by petition of right, and while the Court of Chancery as such will not decree a sale of property, the title to which has become vested in the Crown since the lien created, yet it will decree that the property be delivered to the mortagee to be held and enjoyed by him until the Crown sees fit to redeem.

The Siren, 7 Wall, 157-8, citing Reeve vs. Attorney General, 2 Atkins, 223; 3 Younge and Collier (Exch. Eq.,) 342.

It seems the Court of Exchequer as a court of revenue will decree such a sale.

Reeve vs. Attorney General, 2 Atkins, 223.

"By final judgment for the petitioner, and not before (under a petition of right), the possession of the Crown is terminated."

Briggs vs. Lightboats, 11 Allen, 171-2.

Assuming the sale and purchase of road by the State to be valid, in what way can the State's rights be affected by an injunction against the Treasurer restraining him from paying the amounts appropriated by the Legislature for the payment of the interest on the $1,950,000 of the State bonds substituted for the first series of the endorsed bonds?

The effect of such a restraining order would only be to coerce the holders of the bonds to disclose themselves and litigate with complainant the right of the holders of the $600,000 series to participate in the proceeds of the sale of the road.

Certainly if the mortgage is one of indemnity to the State as to all the paid bonds then both series stand upon the same footing and are entitled to be *pari passu*. If, for reasons heretofore given, the mortgage is only an indemnity to the State as to the $1,950,000 series, but a direct mortgage to secure the $600,000 series (because it was so understood between the State, the railroad company, and the purchasers of this last series when they were issued,) then the $600,000 series rank the others and are entitled to be paid in full before the holders of the first series can be paid out of the proceeds of the road at all. Hence the importance to complainant of the injunction sought against the Treasurer.

III.

If the mortgage is one of indemnity to the State alone as to both series of bonds, then it is submitted for the reasons already given, to-wit: a failure to comply with the Act authorizing the sale, that complainant is entitled to have the sale set aside and a re-sale ordered.

Generally a surety, indemnified by mortgage, holds the mortgage as trustee for the holder of the note on which he is surety.

Eastman vs. Foster, 8 Met., 19.

IV.

As to the property contained in the schedule to exhibit E., it has been attempted to be shown that it is not covered by the mortgage so far as the $1,950,000 series of bonds is concerned, and that hence the parties in possession are mere tort-feasers, and cannot shelter themselves behind the sovereignty of the State.

The three bonds of the $1,950,000 series contained in the schedule are not named in the Governor's deed (Record, p. 22), nor was it possible for him to seize and sell shares in a New York corporation. As to those bonds and shares, therefore, Renfroe is in possession individually.

V.

Was the endorsement of the $600,000 series of bonds unconstitutional and therefore void in the hands of a *bona fide* holder?

The constitutional provision upon the subject is as follows:

"The General Assemby shall pass no law making the State a stockholder in any corporate company; nor shall the credit of the State be granted, or loaned, to aid any company without a provision that the whole property of the company shall be bound for the security of the State, prior to any other debt, or lien, except to laborers; nor to any company in which there is not, already, an equal amount invested by private persons."

Constitution of 1868, Article III, Section VI. Code 5068.

The report of the committee upon which the Legislature declared the endorsement void, says:

"The issuing of the bonds was an unconstitutional Act in as much as the capital of the company was not sufficient to cover the endorsement." (Report of committee, p. 181–2.)

Yet the committee report by one method of calculation that there was *invested in the road, not* proceeds of any endorsed bonds, the sum of $3,349,140; far more than the par value of all the endorsed bonds. (Report, page 180.

By another, still excluding proceeds of endorsed bonds, $2,281,640, very nearly enough to cover both series, and when is added to this the sums omitted in the calculation, "which some of the witnesses before us think should properly be taken into account of construction," "these estimates will be considerably increased." (Report, p. 179-80.)

It will be noted that the committee confine their investigations to the amount expended in "construction" of the road. Neither the Constitution nor the Act of 1866 requires that the amount '*bona fide* subscribed and paid into said company" shall be invested in the construction of the road. Exhibit E of the bill shows a large amount of capital held which was not so invested.

But conceding the committee were right in their calculations, neither

they nor the Legislature of 1875, which declared the endorsement void, presumably for the reason given by their own committee appointed to investigate the matter, were the proper judges. The Constitution makes the "General Assembly," which authorizes the endorsement, the judges as to whether the conditions required by the Constitution have been complied with.

In as much as the Act of 1870 authorizes the unconditional endorsement of the $600,000 series, and recites that the road was completed, it will be presumed that the Legislature of that year satisfied itself that all precedent conditions required by law had been complied with.

If they erred, still their judgment was that of a tribunal of last resort, under which the contract was entered into, and which cannot now be impaired even by a State Constitutional Convention.

Young vs. Montgomery and Eufaula R. R., 2 Woods, 615-6; Piqua Bank vs. Knoop. 16 Howard, 369; Ohio Life Insurance Co. vs. Debolt Treasurer, Ib., 431; Douglass vs. County of Pike, 101 U. S. R., 677. See page 687.

The repudiation of the bonds and the seizure of the property to the use of the State are in violation to the United States Constitution.

Curran vs. Arkansas, 15 Howard, 312-14-18-19; Jefferson Branch Bank vs. Skelly, 1 Black, 436; Dodge vs. Wooley, 18 Howard, 331.

But admitting the endorsement unconstitutional so far as it is claimed that it binds the State *as surety for the debt*, it is submitted that it is good to *bind the property*, and as to this property, the State would be estopped to deny the mortgage to the holders of the $600,0 0 series, and would be postponed as to any claim she might have for indemnity against her liability on the $1,950,000 series until the $600,000 series is paid. It will hardly be claimed that by refusing to appear she can impose upon the Court the duty of maintaining her rights, irrespective of the superior equities of parties before the Court.

The action of the State, by the Act of October 27th, 1870, by the endorsement of the Governor under that Act, by the resolutions of affirmance of August 14th, 1872, and by acceptance of the confirming mortgage and of the release of the second mortgage bondholders, is certainly such a representation which, when taken in connection with the subsequent purchase of the bonds upon the faith of such action, constitutes a very strong appeal for the interposition of the Court.

Code, §3174, reads thus;

§3174. (2117) *Misrepresentation.* Misrepresentation of a material fact made wilfully to deceive, or recklessly without knowledge, and acted on by the opposite party, or if made by mistake and innocently, and acted on by the opposite party, constitutes legal fraud.

"Where the persons appointed by law to certify that the preliminary requisites have been complied with, do so certify, their certificate is conclusive in favor of the holder who, on the strength of said certificate, pays his money for the bonds without notice of any defect or illegality."

Chambers vs. Clews, 21 Wall., 321; Knox Co. Com'rs. vs. Aspinwal, 21 How., 537—45: Moran vs. Com'rs. of Miami Co., 2 Black, 722.

But, conceding the unconstitutionality of the endorsement upon the $600,000 series, and that no question of estoppel exists, still we submit that if the statutory mortgage is a direct mortgage to the holders of the endorsed bonds, then the State cannot claim the right to be paid out of the mortgaged property, until the $600,000 series is paid, upon the principle that a surety is not entitled to an assignment of the security (mortgage) from the creditor unless he pays off not only the debt for which he is

surety, but also such further sum as may have been advanced by the creditor on the security of the same mortgage, even though the surety was ignorant of the second advance, and it was not contemplated at the time of the original loan.

Williams vs. Owens, 13 Simon, 597 ; Fairbrother vs. Wodehouse, 23 Beavan, 28 ; Union Bank, &c., vs. Edwards, 1 Gill. & J., 346-363-4-5 : 1 Hilliard on Mortgages (ed. 1872) 317, §47.

In Fairbrother vs. Wodehouse, 23 Beavan, 28, "it was decided that where two properties are mortgaged by A to B, for distinct sums, and C is surety for one only, the right of B to retain all the securities until repaid both debts overrides the right of C to have the benefit of the securities for that debt for which he is surety. There the defendant lent A, at the same time, two sums of 2,000l. and 3,000. on distinct securities, and the plaintiff was surety for the first sum. It was held that the plaintiff, on paying the 2,000l, was not entitled to have a transfer of the securities held for that sum until defendant had also been paid the 3,000l."

DeCollyar on Guarantees, and Principal and Surety, (ed. 1875) 327.